CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 **MAY 4, 1994** **NO. 18**

This issue contains:

U.S. Customs Service
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U.S. Court of International Trade
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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decision

(T.D. 94–42)

CUSTOMS BROKER LICENSE CANCELLATIONS, CHARLESTON DISTRICT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker licenses have been cancelled due to the death of the broker. These licenses were issued in the Charleston Customs District.

Custom brokers	*License no.*
Dolan Forte	4290
John Leon Joye, Jr.	2888
Albert L. Thompson	2192

Dated: April 14, 1994.

ROBERT J. FERNANDEZ,
Acting Director,
Office of Trade Operations.

[Published in the Federal Register, April 25, 1994 (59 FR 19750)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5–1994)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of March 1994 follow. The last notice was published in the CUSTOMS BULLETIN on March 30, 1994.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: April 18, 1994.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9400039	19940307	20140307	BOY AND GIRL ON TRAIN	YOUNGS INC.	N
COP9400040	19940311	20140311	PEONY	H.K. GROUP, INC.	N
COP9400041	19940311	20140311	TEA STAIN	H.K. GROUP, INC.	N
COP9400042	19940317	20140317	CRESCENT MOON WITH FACE	GARY PELZMAN	N
COP9400043	19940317	20140317	STAR WITH FACE	ROBERT POWELL ASSOCIATES	N
COP9400044	19940317	20140317	SUN'S UP: SMILING SUN ICON	ROBERT POWELL ASSOCIATES	N
COP9400045	19940318	20140318	HAPPY BIRTHDAY	FRANCES MEYER, INC.	N
COP9400046	19940318	20140318	SURPRISE SILVER	FRANCES MEYER, INC.	N
COP9400047	19940318	20140318	PRIME TIME FIGHTER	TAITO CORPORATION	N
COP9400048	19940321	20140321	AVEDA BLUE MALVA SHAMPOOL FOR ALL HAIR TYPES	A-VEDA CORPORATION	N
COP9400049	19940321	20140321	ALUMINUM OBLONG TRAY W/RAISED RABBIT & LEAF DESIGN	ARTHUR COURT	N
COP9400050	19940321	20140321	ALUMINUM OBLONG TRAY W/RAISED ELEPHANT DESIGN #10-336	ARTHUR COURT	N
COP9400051	19940329	20140329	PUMP-N-SEAL INSTRUCTIONS	PIONEERING CONCEPTS, INC.	N
COP9400052	19940329	20140329	WINTON TILE PATTERN NOS. 5152-5153	SWIFF-TRAIN COMPANY	N
COP9400053	19940329	20140329	WINTON TILE PATTERN NOS. 5381-5382	SWIFF-TRAIN COMPANY	N
COP9400054	19940329	20140329	SARATOGA	APPLE COMPUTER INC.	N
COP9400055	19940329	20140329	DISTINCTIVELY DECORATIVE FIGURINES & LAMP	PEI-CHEN (JENNIE) CHIANG	N
COP9400056	19940329	20140329	THE HAIR SCROO	NORTHGATE HOLDINGS LIMITED	N
COP9400057	19940329	20140329	THE HAIR SCROO	NORTHGATE HOLDINGS LIMITED	N
COP9400058	19940331	20140331	#2779 WORK SHOP CLOCK (CARVING ONLY)	BURWOOD PRODUCTS CO.	N
COP9400059	19940331	20140331	PRIME TIME FIGHTER	TAITO CORPORATION	N
COP9400060	19940331	20140331	OFFICIAL COLLECTOR SERIES	KONAMI INC.	N
SUBTOTAL RECORDATION TYPE			22		
TMK9400119	19940303	20031109	MAKING SOCCER HISTORY	WORLD CUP USA 1994, INC.	N
TMK9400120	19940303	20031207	1994 WORLD CUP	WORLD CUP USA 1994 INC.	N
TMK9400121	19940303	19991128	B.D. BAGGIES AND DEVICE DESIGN	THE APPAREL GROUP, INC.	N
TMK9400122	19940303	20000515	THE ORGINIAL B.D. BAGGIES AND DEVICE DESIGN	THE APPAREL GROUP, INC.	N
TMK9400123	19940307	20031124	JACK DANIEL'S	JACK DANIEL DISTILLERY, LEM	N
TMK9400124	19940310	20030921	FLEXGEL	AMERICAN TELEPHONE & TELEGRAPH	N
TMK9400125	19940310	20010305	LANNET	LANNET DATA COMMUNIATION LTD.	N
TMK9400126	19940310	20030914	MULTIMAN	LANNET DATA COMMUNIATION LTD.	N
TMK9400127	19940310	20030126	CARL ZEISS	CARL-ZEISS-STIFTUNG	N
TMK9400128	19940310	20030608	GRAYLOY	SOUTHWEST OILFIELD PRODUCTS, INC	N
TMK9400129	19940310	20030511	DUAL-DURO	SOUTHWEST OILFIELD PRODUCTS, INC	N
TMK9400130	19940310	20070530	BOSE	BOSE CORPORATION	N
TMK9400131	19940310	20040820	BOSE	BOSE CORPORATION	N
TMK9400132	19940310	20020516	901	BOSE CORPORATION	N
TMK9400133	19940310	20020516	LOUDSPEAKER DESIGN	BOSE CORPORATION	N
TMK9400134	19940310	20030118	BUBBLE YUM DESIGN	NABISCO BRANDS, INC.	N
TMK9400135	19940310	20001022	BEECH-NUT DESIGN	NABISCO BRANDS, INC.	N
TMK9400136	19940310	19981007	ROYAL	NABISCO, INC.	N
TMK9400137	19940310	19950305	PLANTERS	NABISCO, INC.	N
TMK9400138	19940310	19951111	ROYAL	NABISCO, INC.	N
TMK9400139	19940310	20030306	BREATH SAVERS	NABISCO BRANDS, INC	N
TMK9400140	19940311	20090124	THE MEN'S WEARHOUSE	MEN'S WEARHOUSE, INC.	N
TMK9400141	19940311	20050122	IBARRA	CHOCOLATERA DE JALISCO, SA DE CV	N
TMK9400142	19940311	20001120	TADIN AND DESIGN	ANTONIO GONZALEZ	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9400143	19940321	20030928	MARIO PAINT	NINTENDO OF AMERICA	N
TMK9400144	19940321	20030824	MULTINENT	LANNET DATA COMMUNICATION	N
TMK9400145	19940321	20031019	BARRY-KIESELSTEIN-CORD	BARRY STEVEN CORD	Y
TMK9400146	19940321	20010414	LA PRAIRIE	LA PRAIRIE, INC.	N
TMK9400147	19940321	19991120	HOYLE	BROWN & BIGELOW, INC.	N
TMK9400148	19940321	20050516	MAVERICK	BROWN & BIGELOW, INC.	N
TMK9400149	19940321	19980131	TRUMP	BROWN & BIGELOW, INC.	N
TMK9400150	19940321	20030727	DIAMOND SYMBOL	COOPER INDUSTRIES INC.	N
TMK9400151	19940329	20081227	STYLIED LYNX HEAD	LYNX GOLF INC.	N
TMK9400152	19940329	20030922	RED STRAND IN WIRE ROPE	WIRE ROPE CORPORATION	N
TMK9400153	19940329	20030613	MOKI	GERARD ENTERPRISES, INC.	Y
TMK9400154	19940329	20030413	SOAP DISPENSERS	STEINER COMPANY INC.	N
TMK9400155	19940329	20031026	DISPENSERS FOR LIQUID SOAP	STEINER COMPANY INC.	N
TMK9400156	19940330	20020825	TROPHY BRAND	P.T. KARTIKA ABEF INTERNASIONAL	N
TMK9400157	19940330	20031120	MAGGIE JONES	AMASIA INTERNATIONAL LTD.	N
TMK9400158	19940330	20030420	MICRO SONIC	FEDDERS NORTH AMERICA, INC.	N
TMK9400159	19940330	20030511	DVVCONFIRM (STYLIZED)	AMERICAN DIAGNOSTICA INC.	N
TMK9400160	19940330	20031207	SPORTS ADVENTURE	KNOWLEDGE ADVENTURE, INC.	N
TMK9400161	19940330	20031207	SPACE ADVENTURE	KNOWLEDGE ADVENTURE, INC.	N
TMK9400162	19940330	20031207	SCIENCE ADVENTURE	KNOWLEDGE ADVENTURE, INC.	N
TMK9400163	19940330	20031019	KNOWLEDGE ADVENTURE	KNOWLEDGE ADVENTURE, INC.	N
TMK9400164	19940330	20031116	DINOSAUR ADVENTURE	KNOWLEDGE ADVENTURE, INC.	N
TMK9400165	19940330	20010305	VEHICULAR SUNSHIELD & AUTOMOBILE DESIGN	ABRAHAM LEVY	N
TMK9400166	19940330	20030416	VEHICULAR SUNSHIELD (DESIGN)	ABRAHAM LEVY	N
TMK9400167	19940330	20050423	MOHINDER & TIGER DESIGN	MOHINDER SPORTS, INC.	N
TMK9400168	19940330	20070414	MOISTURE-MASTER	AQUAPORE MOISTURE SYSTEMS, INC.	N
TMK9400169	19940330	20050625	AQUAPORE	AQUAPORE MOISTURE SYSTEMS, INC.	N
TMK9400170	19940330	20000123	RAINMASTER	AQUAPORE MOISTURE SYSTEMS, INC.	N
TMK9400171	19940330	20030905	L.A. KID	DAREN L.A. KID	N
TMK9400172	19940331	20030309	CHERISHED TEDDIES	ENESCO CORPORATION	N
TMK9400173	19940331	20001030	NOBEL APPAREL	NOBEL APPAREL, INC.	N
TMK9400174	19940331	20010910	24 WINNERS	SPORTS "N" MORE CORP.	N
TMK9400175	19940331	20010409	NOVIN	NOBLE SPORTSWEAR	N
TMK9400176	19940331	20031109	CONFIGURATION FOR A LIGHTING FIXTURE BACKPLATE	L. D. KICHLER CO.	N
TMK9400177	19940331	20020114	SALUX	SALUX CO., LTD.	N
TMK9400178	19940331	20030105	INSIDERS' GUIDE DESIGN	INSIDERS' GUIDE, INC.	N
TMK9400179	19940331	20030105	THE INSIDERS' GUIDE	INSIDERS' GUIDE	N
TMK9400180	19940331	20040119	BLUE DANUBE	LIPPER INTERNATIONAL, INC.	Y
TMK9400181	19940331	20000503	RACING CHAMPIONS	RACING CHAMPIONS, INC.	N
TMK9400182	19940331	20021103	MAGUARY AND DESIGN	INDUSTRIAS ALIMENTICIAS MAGUARY	N
SUBTOTAL RECORDATION TYPE		64			
TNM9400001	19940307	99999999	SUPERIOR SEEDLES GRAPE CO.	SUN WORLD INC.	N
TNM9400002	19940307	99999999	CALIFORNIA SILK COLLECTION	CALIFORNIA SILK COLLECTION	N
SUBTOTAL RECORDATION TYPE		2			
TOTAL RECORDATIONS ADDED THIS MONTH		88			

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., April 19, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

PARTIAL MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PLASTIC TOP AND BOTTOM PORTION OF UNASSEMBLED PICNIC COOLER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of partial modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is partially modifying a ruling letter concerning the tariff classification of the plastic top and bottom portions of an unassembled picnic cooler. Notice of the proposed partial modification was published March 9, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 10.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after May 8, 1994.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 9, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 10, proposing to partially modify Headquarters Ruling Letter (HRL) 953584, issued July 20, 1993, by the Director, Commercial Rulings Division, Office of Regulations and Rulings, concerning the tariff classification of the plastic top and bottom portions of an unassembled picnic cooler in subheading 4202.99.1000, Harmonized Tariff

Schedule of the United States Annotated (HTSUSA). No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is partially modifying HRL 953584 to reflect proper classification of the plastic top and bottom portions of the picnic cooler in subheading 4202.99.9000, HTSUSA, which provides for "other" containers of plastics.

Publication of rulings or decision pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 14, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., April 14, 1994.

CLA–2 CO:R:C:T 955261 SK
Category: Classification
Tariff No. 4202.99.9000

MR. DONALD L. FISCHER
HORTON, WHITELEY & COOPER
1900 Embarcadero, ste. 201
Oakland, CA 94606

Re: Partial modification of HRL 953584 (7/20/93); classification of unassembled picnic cooler; top and bottom portions of the picnic cooler classifiable under 4202.99.9000, HTSUSA; subheading 4202.99 provides for articles wholly or mainly covered with paper; subheading 4202.99.9000 provides for "other" containers of plastics.

DEAR MR. FISCHER:

On July 20, 1993, this office issued you Headquarters Ruling Letter (HRL) 953584 in which we classified an unassembled picnic cooler. Upon review, that ruling is deemed to be partially in error. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed partial modification of HRL 953584 was published on March 9, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 10.

Facts:

The merchandise at issue consists of separately imported components of plastic beverage containers. The finished product is described as a molded plastic "sports novelty cooler." It is an insulated spherical picnic food carrier which resembles a sports ball—e.g., a golf ball or a baseball-and measures approximately 12½ inches in diameter.

The three parts of the carrier consist of the plastic bottom half, the plastic top half, and a semi-circular plastic handle which clips onto the sides of the bottom half of the carrier. A clip on the underside of the handle attaches it to the upper surface of the top sphere. When the top half is fitted to the bottom half, the handle secures the pieces together.

The three pieces were to be imported in different vessels and itemized in different entries. Alternatively, the top and bottom halfs of the cooler were to be imported preassembled, with the plastic handle imported separately on a different vessel and entry.

This modification pertains only to the classification of the top and bottom plastic portions of the article; the law and analysis section of HRL 953584 remains unmodified as does the portion of the holding which classified the plastic handle. Our analysis follows.

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 4202, HTSUSA, provides for:

> Trunks, suit-cases, vanity-cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.

In HRL 953584, this office held that the plastic top and bottom portions of the unassembled picnic cooler were classifiable under subheading 4202.99.1000, HTSUSA. Customs' intent in HRL 953584 was to classify the plastic top and bottom portions of the unassembled picnic cooler as "other containers of plastics." However, subheading 4202.99.1000, HTSUSA, provides for other containers of plastics that are *"wholly or mainly covered with paper."* As the subject merchandise of HRL 953584 is *not* covered with paper, classification is not proper within this subheading. Classification of the subject merchandise is proper under subheading 4202.99.9000, HTSUSA, which provides for "other" containers of plastics.

Holding:

The law and analysis portion of HRL 953584, and the classification of the plastic handle of the unassembled picnic cooler, remain unmodified.

The portion of HRL 953584 which classified the plastic top and bottom portion of the unassembled picnic cooler is modified and classification is now within subheading 4202.99.9000, HTSUSA, which provides for, *inter alia*, other plastic containers dutiable at a rate of 20 percent *ad valorem*. There is no textile quota category applicable to the merchandise at this time.

HRL 953584 is hereby partially modified.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO THE COUNTRY OF ORIGIN OF QUILTS

ACTION: Notice of proposed revocation of a country of origin ruling.

SUMMARY: Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the country of origin of certain quilts.

DATE: Comments must be received on or before June 3, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Textiles Classification Branch, (202) 482–7050

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the country of origin of certain quilts.

In Customs Headquarters Ruling Letter (HQ) 951210 issued April 24, 1992, by this office, the country of origin of finished quilts assembled in Lesotho from materials that may have been produced in different countries was China, where the top (face) fabric originated.

Customs believes that the determination in HQ 951210 is *probably* not in accord with Section 12.130, Customs Regulations (19 CFR § 12.130), and that, in any event, Customs did not have sufficient facts available on which to predicate a definite country of origin determination. § 12.130 states that a textile or textile product consisting of materials processed in more than one foreign country shall be a product of the country where the last substantial transformation occurs. It also provides that a textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

If, in Lesotho, (1) fabric and batting are cut to size to form the back and padding of a quilt, (2) the back, the front, and the padding are stitched together, the stitching being done in specific designs over the

entire area of the quilt, and (3) the quilt is finished by stitching a binding strip of fabric around all the edges, it is now our opinion that the foreign components have undergone a transformation into a new and different article of commerce by means of substantial manufacturing or processing operations in Lesotho. Accordingly, if the quilts which are the subject of HQ 951210 are processed in Lesotho as described above, they should be considered products of Lesotho.

However, it is not stated in HQ 951210 where the batting and back fabric originated or what processing they were subjected to, if any. If the top (face fabric) component and one or both of the remaining primary components of a quilt originate in China and in Lesotho the three components are stitched and binded together, then Customs would have to readdress the factual situation in applying § 12.130.

Customs intends to revoke NY 951210 to reflect that the proper country of origin of the goods is probably Lesotho, but that without sufficient facts, we are unable to definitely determine the country of origin of the quilts which were the subject of that ruling. Before taking this action, consideration will be given to any written comments timely received. HQ 951210 is Attachment A to this document. The proposed ruling revoking HQ 951210 is Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 19, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., April 24, 1992.
CLA–2 CO:R:C:T 951210 JED
Category: Country of origin

MS. SHERRI JONES, GENERAL MANAGER
UNIQUE QUILTS, INC.
3195 Park Road
Suite E
Benicia, California 94510

Re: Country of origin determination concerning quilts.

DEAR MS. JONES:

This country of origin determination concerns the merchandise for which you have already received a classification ruling. HQ 089899 (October 30, 1991) classified the subject quilts in subheading 9404.90.8000, HTSUSA. In that ruling, we requested additional information in order to arrive at a country of origin determination. You responded by letter of February 18, 1992.

Facts:

In China, 100% cotton fabrics are hand-cut into pieces. The pieces are machine sewn together to form a pattern or design according to various layouts. These sewn together pieces of fabric, which you now refer to as quilt tops, range in size from 1656 sq. in. to 10,528 sq. in. Your estimate is that the operations up to this point account for approximately $^1/_3$ of the total time necessary to produce a finished quilt. These quilt tops are sent to Lesotho.

In Lesotho, 100% polyester batting is placed between the quilt top and a backing layer of plain 100% cotton fabric. The backing is one piece. The three pieces are hand-stitched together using 5–6 stitches per inch. The stitching or quilting is done in specific designs over the entire area of the quilt. When this is done, a binding consisting of a strip of 100% cotton fabric is machine stitched to the front side and around the perimeter of the quilt. This binding is then wrapped around and hand stitched to the back of the quilt. You state that the item is now a completed quilt.

Issue:

What is the country of origin of the above described quilts?

Law and Analysis:

For country of origin purposes, § 12.130, Customs Regulations (19 CFR 12.130), is applicable to the merchandise at issue. Section 12.130(b) provides that a textile product that is processed in more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession of the U.S. where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Section 12.130(d), Customs Regulations sets forth criteria for evaluating the two prongs of the substantial transformation determination. The regulation states that the criteria are not exhaustive; one or any combination of criteria may be determinative, and additional factors may be considered. Section 12.130(d)(1) states that a new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in: (i) commercial designation or identity; (ii) fundamental character; or (iii) commercial use.

Section 12.130(d)(2) states that in determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered regarding the manufacturing or processing operations in each foreign country or territory, or insular possession of the U.S.: (i) the resulting physical change in the material or article; (ii) the time involved; (iii) the complexity of the operations; (iv) the level or degree of skill and/or technology required; and (v) the value added to the article or material.

Customs has long held that the mere assembly of goods by simple combining operations, trimming, or joining together by sewing is not enough to substantially transform the components of an article into a new and different article of commerce. For example, in HRL 082747 (February 23, 1989) Customs determined that the assembly of jeans was not a substantial transformation and in HQ 950887 (March 2, 1992) held that the assembly of piece goods into a brassiere was not a substantial transformation.

The processing in Lesotho involves the sewing together of a quilt top from China with two other layers of material and the addition of a binding. Such processing is not significant enough to constitute a substantial transformation as defined by the regulations set forth above. The country of origin of the quilts is China as that is where the piece goods are cut and sewn together and where the material last underwent a substantial transformation.

Holding:

The country of origin of the quilts is China.

Section 177.9(b)(1), Customs Regulations (19 CFR 177.9(b)(1)), states that a ruling is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. Accordingly, the holding set forth above applies only to the specific factual situation and the merchandise identified in the ruling request. Should it subsequently be determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be

subject to modification or revocation. If there is a change in the facts furnished, the holding in this ruling may be affected. In such an event, it is recommended that a new ruling request be submitted in accordance with § 177.2, Customs Regulations (19 CFR 177.2).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:G 956221 PR
Category: Classification

GENERAL MANAGER
UNIQUE QUILTS, INC.
3195 Park Road, Suite E
Benicia, California 94510

Re: Reconsideration and Revocation of Customs Headquarters Ruling (HQ) 951210 Concerning the Country of Origin of Quilts.

DEAR SIR OR MADAM:

This is in reference to Customs Headquarters Ruling (HQ) 951210, of April 24, 1992, addressed to your company, concerning the country of origin of quilts. We have reviewed that ruling and determined that it is in error. This revokes that ruling.

Facts:

According to the information submitted, the quilts are made in the following manner. In China, cotton fabrics are cut into pieces which are hand sewn together in patterns or designs to form a quilt top (face fabric). The quilt tops range in size from 1656 to 10,528 square inches and account for approximately $^1/_3$ the total time required to produce a finished quilt. In Lesotho, the quilt top is hand-stitched to a polyester batting and a cotton fabric backing. The stitching (five to six stitches per inch) is done in designs over the entire area of the quilt. A cotton fabric binding is then machine stitched around the perimeter and then wrapped around and hand-stitched to the back of the quilt.

Nothing in HQ 951210, or in the file related to that ruling, indicates where the middle polyester batting layer or the cotton backing fabric originated. Nor is there any indication how, or where, the batting and the backing were processed.

Issue:

The issue presented is which country, China or Lesotho, is the country of origin of the subject quilts.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Section 12.130(d) provides:

> (d) **Criteria for determining country of origin.** The criteria in paragraphs (d)(1) and (2) of this section shall be considered in determining the country of origin of imported merchandise. These criteria are not exhaustive. One or any combination of criteria may be determinative, and additional factors may be considered.
>
> (1) A new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:
>
> (i) Commercial designation or identity,

(ii) Fundamental character or
(iii) Commercial use.
(2) In determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered:
(i) The physical change in the material or article as a result of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
(ii) The time involved in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
(iii) The complexity of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
(iv) The level or degree of skill and/or technology required in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
(v) The value added to the article or material in each foreign territory or country, or insular possession of the U.S., compared to its value when imported into the U.S.

In applying the above criteria, and other criteria in § 12.130, it appears that the country of origin to the quilts in question **may be** Lesotho. What is exported from China is a rectangular-shaped fabric that has neither the identity or character of a quilt. Nor, obviously, is it useable as a finished quilt. We recognize that it may be argued that the fabric is dedicated for use in the production of a quilt. However, in our view, mere dedication to use of a fabric is usually not sufficient to establish the character or identity of that fabric as a finished quilt.

The joining of the top fabric with the batting and backing fabric and the processing which results in a finished quilt is a significant change in the appearance and functional ability of the top fabric. In addition, we note that according to the submission, the time, expense, and complexity of the processing done weigh heavily in Lesotho's favor.

Holding:

Customs is unable to make a definitive country of origin determination without knowing the origin of the middle polyester batting and the cotton backing, and where and how they were processed. For example, if the polyester batting and cotton backing are also produced in China, Customs would have to examine this situation in greater detail to determine the country of origin of the quilts. No ruling on the country of origin of the quilts can be made until information concerning where the batting and backing were formed, and where and how they were processed prior to their joining with the quilt top is submitted.

HQ 951210, dated April 24, 1992, is hereby revoked.

JOHN DURANT,
Director,
Commercial Ruling Division.

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning April 1, 1994, the rates will be 6 percent for overpayments and 7 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: April 1, 1994.

FOR FURTHER INFORMATION CONTACT: John V. Accetturo, National Finance Center, Revenue Accounting Branch, (317) 298–1308.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first-month period of the previous quarter.

The rates of interest for the period of April 1, 1994—June 30, 1994, are 6 percent for overpayments and 7 percent for underpayments. These rates will remain in effect through June 30, 1994, and are subject to change on July 1, 1994.

Dated: April 13, 1994.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

[Published in the Federal Register, April 21, 1994 (59 FR 19042)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 177

TARIFF CLASSIFICATION OF
HEADBANDS AND SIMILAR ARTICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of comments.

SUMMARY: At its Tenth Session the Harmonized System Committee of the Customs Cooperation Council approved certain amendments to the Explanatory Notes concerning the classification of textile headbands. One of these amendments states that textile headbands are excluded from Heading 9615 of the Harmonized Commodity Description and Coding System. In past rulings, Customs has classified certain textile headbands in Heading 9615 of the Harmonized Tariff Schedule of the United States (HTSUS). In application of these amendments to the Explanatory Notes, we believe that textile headbands are excluded from Heading 9615, HTSUS, and are classifiable in Section XI, HTSUS. This document invites comments on the classification of textile headbands.

In addition, in the past we have classified ponytail holders and similar articles in Heading 9615, HTSUS. In view of the decision by the Harmonized System Committee and our reexamination of the issue, we are of the opinion that only hair care accessory items of rigid or semi-rigid construction should be classified in Heading 9615, HTSUS. Ponytail holders and similar hair care accessories, not of rigid or semi-rigid construction, comprised of textile materials, should be excluded from Heading 9615, HTSUS, and classified as clothing accessories of Section XI, HTSUS. Therefore, we are also inviting comments on the classification of ponytail holders and similar hair care accessories.

DATES: Comments must be received on or before June 20, 1994.

ADDRESS: Comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1301 Constitution Ave., NW., Washington, D.C. 20229. Comments may be viewed at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Commercial Rulings Division, U.S. Customs Service, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section XI of the Harmonized Tariff Schedule of the United States (HTSUS) provides for textiles and textile articles. Heading 6117, HTSUS, provides for other made up clothing accessories, knitted or crocheted. Heading 6217, HTSUS, provides for other made up clothing accessories, not knitted or crocheted. Heading 9615, HTSUS, provides for combs, hair-slides and the like, hairpins, curling pins, curling grips, hair-curlers, and the like, other than those of Heading 8516, and parts thereof.

At its Tenth Session the Harmonized System Committee of the Customs Cooperation Council examined the classification of knitted headbands and approved the following three amendments to the text of the Explanatory Notes:

1. *Explanatory Note to Heading 61.17 (page 845, new item (12)):*
"*Headbands,* used as protection against the cold, to hold the hair in place, etc."

2. *Explanatory Note for exclusions to Heading 63.07 (page 868, last paragraph, new item (e):*
"Knitted headbands *(heading 61.17).*"

3. *Explanatory Note to Heading 96.15 (page 1611, new last paragraph):*
"This heading *excludes* textile headbands *(Section XI).*"

According to the decision of the Harmonized System Committee, knitted headbands are classified as clothing accessories of Heading 6117, HTSUS. In addition, textile headbands are excluded from classification in Heading 9615, HTSUS, and instead, are to be classified as textile articles of Section XI, HTSUS.

The Explanatory Notes to the Harmonized Commodity Description and Coding System (Harmonized System) constitute the official interpretation of the scope and content of the tariff at the international level. They represent the considered views of classification experts of the Harmonized System Committee. While not treated as dispositive, the Explanatory Notes are to be given considerable weight in Customs interpretation of the HTSUS. It has therefore been the practice of the Customs Service to consult the terms of the Explanatory Notes when interpreting the HTSUS.

In the past, Customs has classified many headbands wholly of textile materials in Heading 9615, HTSUS, with the exception being headbands made of terry knit fabric, which were classified in Heading 6117, HTSUS. The rationale for these decisions was that textile headbands met the definition of the term *hair-slides and the like.* We now believe that in application of the recent amendments to the Explanatory Notes, textile headbands do not fall within the scope of Heading 9615, HTSUS, and are excluded from that heading. We are inviting comments regarding this proposed classification change.

The type of article considered by the Harmonized System Committee and classified in Heading 6117, HTSUS, was a soft knitted textile headband, without any underlying foundation of plastic, metal, etc. Some headbands have a mixed construction, e.g., a plastic base and a textile covering. Based on the amendments to the Explanatory Notes and the views expressed by other customs administrations, we believe that headbands of mixed construction, having a rigid or semi-rigid foundation, would meet the definition of the term *hair-slides and the like* and remain classified in Heading 9615, HTSUS. Those headbands of soft construction and made primarily of textile materials would be considered textile headbands and thus would be excluded from Heading 9615, HTSUS.

Accordingly, while we have previously classified many ponytail holders and similar articles in Heading 9615, HTSUS, the evidence of record supports a finding that the term hair-slides and the like of Heading 9615, HTSUS, refers to articles of rigid or semi-rigid construction. This view is consistent with the Explanatory Notes to Heading 9615, HTSUS, which state that *hair-slides and the like* are usually made of plastics, ivory, bone, horn, tortoise-shell, metal, etc. Soft ponytail holders and similar hair care accessories made of textile materials should therefore be excluded from Heading 9615, HTSUS, and be classified as clothing accessories of Section XI, HTSUS. Consequently, we are also inviting comments on the classification of ponytail holders and similar hair care accessories.

COMMENTS

Before making a determination on this matter, Customs invites written comments from interested parties on this issue. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, Office of Regulations and Rulings, Franklin Court, 1099 14th St., NW., suite 4000, Washington, D.C.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: March 31, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, April 20, 1994 (59 FR 18771)]

U.S. Court of Appeals for the Federal Circuit

SEARS ROEBUCK & CO., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 93–1061

(Decided April 8, 1994)

Donald J. Unger, Barnes, Richardson & Colburn, of Chicago, Illinois, argued for plaintiff-appellee. With him on the brief was *Brian F. Walsh.*

Nancy M. Frieden, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With her on the brief were *Stuart M. Gerson,* Assistant Attorney General, *Stuart E. Schiffer,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Steven Berke,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Chief Judge DICARLO.

Before NIES,* NEWMAN, and SCHALL, *Circuit Judges.*

NIES, *Circuit Judge.*

The United States appeals from the judgment of the Court of International Trade holding that the merchandise imported by Sears Roebuck and Company, invoiced as "color video sound camera[s] (video camera & recorder)" and commonly known as "camcorders," is properly classified under item 685.40 of the Tariff Schedules of the United States (TSUS), covering "tape recorders." The government argues that the merchandise is properly classified under item 685.49 TSUS as a combination article consisting of a television camera and tape recorder. We agree and, accordingly, we reverse.

I

Sears is an importer of camcorders, versatile, portable cameras which are able to record scenes and sound on video tape cassettes. The United States Customs Service (Customs) initially classified the camcorders under item 685.49 of the TSUS as a combination article consisting of a television camera and tape recorder.[1] Sears challenged this classifica-

*Circuit Judge Nies vacated the position of Chief Judge on March 17, 1994.

[1]TSUS Schedule 6, Part 5 provided for:

Radiotelegraphic and radiotelephonic transmission apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

* * * * * * *

Other

* * * * * * *

continued

tion before the Court of International Trade on the grounds that the devices contained neither a television camera nor a tape recorder as those tariff items were commonly known at the time TSUS 685.49 was enacted in 1962.[2] In its initial decision, *Sears Roebuck and Co. v. United States,* 790 F. Supp. 299 (Ct. Int'l Trade 1992), the court held that the camera in the camcorder was not a "television" camera. The court reasoned that television cameras must be used in connection with television broadcast transmission apparatus for transmitting electrical waves over a distance. Because the court concluded that camcorders were not designed for this purpose, but instead to replace home movie cameras, it held that Customs erred in classifying the goods under TSUS 685.49. The matter was remanded to Customs for a second determination. *Id.* at 302.

On remand, Customs classified the camcorders under TSUS 685.40 as "tape recorders."[3] On return of the matter to the trial court, neither party supported that classification. Sears advised the court, however, it would not challenge the classification because the tariff rate was no higher than its preferred classification, as an "electrical article not specifically provided for" under TSUS 688.42. The government continued to urge its original classification and insisted that camcorders were more than "tape recorders."

In its second decision concerning this dispute, the court upheld the classification of camcorders as "tape recorders." *Sears Roebuck and Co. v. United States,* No. 92–148, slip op. at 3 (Ct. Int'l Trade Aug. 28, 1992). The court reasoned that the existence of TSUS 724.12, a provision specifically recognizing "magnetic video tape," indicated congressional awareness that images could be recorded on tape. The court also held that classification was governed by the camcorder's primary purpose—"to produce a tape of what appears before the lens"—and not by its subordinate capabilities, such as live monitoring without recording. Based on these conclusions, the court held that Congress intended camcorders to fall under the "tape recorders" provision. *Id.* at 4. The government appeals.

II

We initially note Sears' contention that the United States may not assert in this appeal that the classification of camcorders as a combina-

---

	Other	
*	* * * * * * *	
	Other	
*	* * * * * * *	
685.49	Other	5.2% *ad val.*

[2] The parties do not dispute that camcorders were introduced into the United States market in the 1980s, subsequent to the passage of the TSUS through the Tariff Classification Act of 1962, Pub. L. No. 87–456, 76 Stat. 72 (1962), *repealed by* Harmonized Tariff Schedule of 1988, Pub. L. No. 100–418, 102 Stat. 1148 (codified at 19 U.S.C. § 1202 (1988)). However, "[t]ariff terms are written for the future as well as the present, meaning that tariff terms can be expected to encompasss merchandise not known to commerce at the time of their enactment, provided the new article possesses an essential resemblance to the one named in the statute." *United States v. Standard Surplus Sales, Inc.*, 667 F.2d 1011, 1014 (CCPA 1081) (citations omitted).

[3] Item 685.40 provided for:

Radiotelegraphic and rediotelephonic transmission and reception apparatus: * * * Tape recorders * * * and parts thereof	4.1% *ad val.*

tion television camera and tape recorder and not simply as "tape recorders" is improper. According to Sears, because Customs submitted the tape recorder classification to the trial court following remand, the United States should not now be permitted to attack this classification before this Court. We disagree.

A party may challenge an interlocutory decision of a trial court on appeal from the final judgment. *Flanagan v. United States*, 465 U.S. 259, 263 (1984). As explained below, the prior decision of the trial court remanding the case was interlocutory and not appealable. Thus, this appeal provides the government's first opportunity to challenge an initial decision which rejected the TSUS 685.49 classification.

Under 28 U.S.C. § 1295(a)(5), an appeal may be taken only from "a final decision of the United States Court of International Trade."[4] Except in unusual circumstances, a remand to Customs does not meet the requirement of finality and thus is not appealable. *See Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986). To determine "whether an order is final enough to be appealable," *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1020 (Fed. Cir. 1986), we must examine the standard set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As later described in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), the *Cohen* test requires that an appealable order meet three conditions:

> [T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

See also Sullivan v. Finkelstein, 496 U.S. 617 (1990); *Travelstead v. Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992).

These standards were not met by the remand order of the trial court in this case. The remand order effectively left the camcorders unclassified, an issue which goes to the heart of the merits of this action. As the United States could not have mounted an appeal from the remand order of the trial court, its arguments are properly addressed by this Court on this appeal.

Such a holding comports with 28 U.S.C. § 2643(b), which empowers the Court of International Trade to employ a number of different mechanisms when determining the proper classification of merchandise under the customs laws, including examining the law on its own initiative, remanding the matter to Customs, and scheduling a retrial. *See Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984). The trial court's choice of procedure does not constrain the ability of Customs to continue to assert that the agency's initial classification was correct. Having been instructed by the trial court that a camcorder was not properly classified as a combination television camera and tape recorder,

[4] We note that 28 U.S.C. § 1292(d)(1) provides a statutory exception to the final judgment rule by allowing a judge of the Court of International Trade to certify an otherwise unappealable order. This Court, in its descretion, may then permit an interlocutory appeal. *See Cabot Corp. v. United States*, 788 F.2d 1539, 1543 (Fed. Cir. 1986). Nothing requires the government to attempt to invoke § 1292, however, to preserve a right to appeal an adverse ruling.

Customs adopted the tape recorder classification as a fallback position. Although Sears argues that it was misled by this "litigation tactic," the record is to the contrary. Even as Customs proposed its "tape recorder" classification on remand in a June 11, 1992, letter to the Court of International Trade, it clearly stated its reservation of a right to appeal the court's decision:

> Finally, we note for purposes of appeal (should an appeal be taken from a final judgment of this Court), the Government continues to assert the original classification is correct. By submission of this proposed alternative classification, the Government does not waive its right of appeal.

Sears acknowledged the Government's position in a June 25, 1992, letter to the trial court, stating that:

> Sears reserves its right to defend the Court's entry of a final judgment under either of the provisions discussed above in the case before the Court of Appeals for the Federal Circuit should an appeal be pursued by the defendant.

We can only conclude from these exchanges that Sears was not led to believe that Customs abandoned or waived its original classification. This Court has held, in analogous circumstances concerning judicial review of a Customs decision, that the acknowledged reservation of a party's right to appeal mitigates against a holding of estoppel. *See Trayco, Inc. v. United States,* 994 F.2d 832, 839 (Fed. Cir. 1993). We now turn to the merits of this appeal.

III

A

A determination of the meaning of a tariff term is a question of law, reviewed *de novo. Digital Equip. Corp. v. United States,* 889 F.2d 267, 268 (Fed. Cir. 1989). Because no clearly stated congressional intent provides the meaning of the tariff terms at issue in this appeal, we may construe the terms according to their common meaning. *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786, 789 (Fed. Cir.), *cert. denied,* 488 U.S. 943 (1988). This meaning may be based upon our "own understanding of the terms used," assisted by consideration of "lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Id.* The determination of whether an article falls within the definition is a question of fact. *Daw Indus. v. United States,* 714 F.2d 1140, 1142 (Fed. Cir. 1983). In this case, however, it is undisputed that the definition of a television camera urged by Customs *ipso facto* covers the camera portion of a camcorder.

The government urges that a television camera requires simply a lens, a pickup device and electronic circuitry which converts the images into electric signals. There is no dispute that camcorders meet this definition. The trial court, however, held that a television camera requires more than the above described capabilities and structure. According to the trial court, a television camera must also be used with

"television transmission apparatus for television *broadcasting* purposes." 790 F. Supp. at 302 (emphasis added). In reaching this conclusion, the court relied upon several dictionary definitions contemporary to the TSUS, including:

> *Television*—Vision at a distance; hence, the transmission and reproduction of a view or scene, esp. a view of persons or objects in motion, by any device which converts light rays into electrical waves and reconverts these into visible light rays.
>
> *Television camera*—The part of a transmitting apparatus in which the image of the scene to be televised is formed for conversion into electrical impulses.

790 F. Supp. at 301 (quoting *Webster's New International Dictionary of the English Language, Second Edition, Unabridged* (1961)). Based on its view that camcorders had to be and are not used in connection with broadcast transmission apparatus, the court held the camera portion was not a television camera. In Sears' view, the above definitions support the trial court's restricted meaning of the term "television camera," limiting the term to only those cameras directly connected to or connectable to broadcast transmission apparatus for contemporaneous viewing at a distance.[5]

We disagree. The above authority defines a television camera as *part of* television *transmitting apparatus*. It is, however, clear that Congress did not adopt a definition of a television camera *as part of* a television transmission system. To the contrary, item 685.49 of the TSUS, which provided the superior heading for the classification of television articles, includes as *separate* items "television transmission and reception apparatus" and "television cameras." Far from suggesting that television cameras are only those cameras which *are part of* a transmission apparatus, this language recognizes a distinction between types of television equipment, namely, transmission equipment, reception equipment and cameras. Once this separation is made, the above definition (as well as others relied on) supports the government's position that a television camera need do no more than convert the captured image into electrical impulses.[6]

We additionally note that TSUS 685.49 provides for combinations of a large assortment of devices, with a combination of television transmission apparatus and cameras as merely one possibility. This possible range of combinations negates the possibility that Congress intended the term "television camera" to be inherently limited to cameras used with television transmission apparatus for live broadcasts. The literal language of the statute—"any combination thereof"—equally suggests the combination of television cameras with "tape recorders," the latter also an item in the superior heading.[7]

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[5] Although Sears asserts that a distinction lies between the terms "television" and "video," we find in the record no documentary evidence of such a difference.

[6] Electrical signals produced by a television camera are not directly broadcastable. Rather, a separate device must convert such signals into carrier waves.

[7] *See supra* note 1.

The broad definition of a television camera proposed by the government is consistent with uses actually made of such cameras in the 1960's, including "studio" cameras which everyone agrees are television cameras. The trial court's view, which ties cameras to "broadcasting," is far too limited to encompass commonplace uses then and now of television cameras with systems other than broadcasting systems.[8] Closed circuit television was already established at the date of the TSUS's enactment as an important use in industrial, commercial, educational and research facilities (known collectively as "industry television"). *See Television,* 21 Encyclopedia Britannica 912a, 913 (1957) (listing closed-circuit applications such as, *inter alia:* "remote observation of furnaces and gauges in power plants"; "surveillance of banking activities"; and "distribution of demonstration lectures to several classes," and noting that "[t]he term 'industrial' television has come to cover all such closed-circuit applications, in brief, virtually all forms of television apart from broadcast television."). This common use of a television camera is excluded under the court's restricted definition. However, nothing suggests that Congress intended to treat television cameras used in closed circuits differently from television cameras used in broadcasting.

Another widely prevalent use of a television camera in 1962 was to make video tape recordings. As noted in *Television,* 21 Encyclopedia Britannica 910A, 912M (1962):

> Recording of television programs on photographic film or magnetic tape is an important technique [in order] to preserve a permanent record of a live-scene program for subsequent rebroadcast * * *. In the U.S. many of the network programs broadcast in and west of Chicago are derived from magnetic recordings, stored for an hour or more after their release along the eastern seaboard to allow for the difference in time in western cities.

Such recorders were developed and commercialized in the late 1950's. Andrew F. Inglis, *Behind the Tube: A History of Broadcasting Technology and Business,* 323–25 (1990). Television cameras were routinely used with such recorders, *id.* at 325–26, and video recordings shortly became preferred to live broadcasts. *See Television,* 18 World Book Encyclopedia 87, 94 (1969) ("Filmed shows have largely replaced live telecasts in recent years."). The ubiquitous reruns provide ample testimony of recordings. *Television,* 18 World Book Encyclopedia 87, 94 (1969). That a camera is used in connection with recording equipment, rather than transmission equipment, does not change its nature.

In 1962, portable television cameras existed as well. *Television,* 21 Encyclopedia Britannica 9210A, 912N (1962). Such cameras could be used to send signals to monitors and then to portable, satellite, or uplink transmitters. At the time of the TSUS enactment, however, portable cameras were also used with separate portable tape recorders to

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[8] Indeed, judicial notice may be taken that television cameras existed before broadcastng systems. *See* Andrew F. Inglis, *Behind the Tube: A History of Broadcasting Technology and Business,* 158–61 (1990); *Television,* The Columbia Encyclopedia 2105, 2105 (3d ed. 1967); *Television,* 21 Encyclopedia Britannica 912A, 912A (1957).

make video tapes. The description of television cameras in the *McGraw Hill Encyclopedia of Science and Technology* includes "portable cameras" which are "[u]sed in conjunction with modern battery powered portable video cassette recorders." 18 *McGraw Hill Encyclopedia of Science and Technology* 545 (1982). *See also* Inglis, *supra*, at 216–19 (describing portable cameras for field use developed in the early 1950's). Thus, we conclude that in both studio and field cameras, a television camera completed its function upon providing electrical image impulses for use by other equipment. The argument that television cameras required or require use directly with transmission equipment is no more viable than the argument that transmission equipment had or has to project images directly from a camera. Just as a video recording can be broadcast without changing the character of television *transmission* equipment, a *television camera* remains a television camera when the transformed images are recorded rather than further transformed and broadcast.

In sum, a television camera is a device which is able to capture a scene through a lens and to convert it into electrical impulses. Whether those impulses are used in connection with a live broadcast either through the air or by cable, or to make a recording for later viewing, or simply displayed on a TV monitor via a closed circuit does not affect the scope of the statutory term "television camera."

B

With the meaning of the tariff term established, we next consider whether Customs correctly classified the merchandise as a combination television camera and recorder. (TSUS 685.49). As indicated, the term "television camera" properly defined includes the camera portion of the camcorder, which bears an essential resemblance to television cameras known at the time of the enactment of the TSUS. A camcorder camera is essentially an improved, miniaturized version of an earlier portable television camera. As with predecessor television cameras, camcorder cameras function toward the same purpose, the capturing of optical images and conversion of those images into electrical impulses. They additionally consist of the same basic elements as earlier television cameras, being fundamentally composed of a lens, pickup devices, and electrical processing and control circuitry.

Further, the camera portion of camcorders is distinctly separate from the VCR (video cassette recorder). The camera portion may be used without recording. As illustrated in the Owners Manual for the devices in issue, users can employ the camcorder to display a scene on the device's viewfinder without recording. Even more telling, the camcorder may be connected to a remote monitor and used independently of the recorder portion to view live action captured by the camera. In that mode, the electrical impulses obtained from the camera are sent to a receiver without recording. A familiar example of such use is for security surveillance purposes. *See, e.g.*, Feldman Test., J.A. at 5–103; Reichard

Test. J.A. at 114–15. Such use is indistinguishable from closed circuit television of the late 1950's.

Neither party now contests that the imported camcorders *include* tape recorders. In addition to recording sight from the camera portion and accompanying sound, the VCR portion of the imported merchandise allows users to record directly from other sources, as well as to transmit and receive taped signals to and from other devices for purposes of editing, dubbing, and duplication. By connection with a television receiver, the VCR portion of the device also allows users to view prerecorded cassettes. Thus, this part of the camcorder is independent of the camera portion and is so advertised.

In view of their separate capabilities, we conclude that camcorders are combination devices with the features of cameras and tape recorders. The camcorder offers its users camera capabilities which are not subordinate to the tape recorder function of the camcorder, are independent of its tape recorder capabilities, and involve different circuitry. At the same time, the VCR portion provides the functions of a tape recorder independently of the camera portion. Thus, camcorders meet the test for a combination article. *See Digital Equip. Corp.*, 889 F.2d at 268; *Carling Elec. Co. v. United States*, 757 F.2d 1285, 1288 (Fed. Cir. 1985).

Finally, in deciding such goods were merely tape recorders, the trial court relied on the fact that most camcorders are bought for home use, essentially replacing home movie cameras. This is an erroneous application of the principle that use may affect classification. *See Rico Import Co. v. United States*, 12 F.3d 1088, 1090 (Fed. Cir. 1993). Camcorders are not improved movie cameras. They are substitutes. Their replacement of movie cameras does not affect their essential functional and structural nature.

In any event, Congress drew no distinction between television cameras used by professionals and those used by amateurs. Moreover, camcorder is a name used for both professional and consumer equipment. Inglis, *supra*, at 358 ("The combined camera-recorder units are now universally called camcorders. There are two types—low-cost consumer products * * * and professional units used by broadcasters."). Were we to adopt the trial court's view, this professional equipment, which is merely a development over the portable television cameras and portable recording units employed prior to the advent of electronic miniaturization, would be excluded. That this development has led to home use does not change the essential resemblance of camcorders to the television equipment in use in 1962. As Sears itself tellingly advertises, a "[c]amcorder is a camera and VCR all in one" or, more tersely, that a "Camera + Recorder = Camcorder."[9]

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[9] *See also* Inglis, *supra*, at 470 ("The camcorder, a combined television camera and tape recorder, is the latest success story in consumer electronics.").

IV

For the foregoing reasons, we conclude that camcorders are properly classified under TSUS item 685.49. The judgment of the Court of International Trade is

REVERSED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

PUBLIC VERSION

(Slip Op. 94–60)

HOSIDEN CORP, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–10–00720

[ADMA's motion for judgment on the agency record is denied. Remand determination of the International Trade Commission is affirmed. Antidumping duty order of the U.S. Department of Commerce, International Trade Administration, regarding EL high information content flat panel displays and display glass therefor from Japan, is revoked. All challenges to antidumping duty order regarding active matrix liquid crystal high information content flat panel displays and display glass therefor from Japan, are dismissed as moot in light of Commerce's revocation of the underlying antidumping duty order.]

(Dated April 14, 1994)

Adduci, Mastriani, Schaumberg & Schill (Louis S. Mastriani, Anri Suzuki, and *Gregory C. Anthes),* for plaintiff Hosiden Corporation.

Donovan Leisure Newton & Irvine (Peter J. Gartland, David S. Versfelt, Christopher P. Johnson, and *Christopher K. Tahbaz),* for plaintiff Sharp Corporation.

Graham & James (Lawrence R. Walders), for plaintiffs Hitachi, Ltd.; Hosiden Corporation; Matsushita Electric Industrial Co., Ltd.; NEC Corporation; Seiko Epson Corporation; and Toshiba Corporation.

Baker & McKenzie (Thomas P. Ondeck and *Kevin M. O'Brien),* for plaintiff Apple Computer, Inc.

O'Melveny & Myers (Kermit W. Almstedt, Peggy A. Clarke, Greta L.H. Lichtenbaum, and *Craig L. McKee),* for plaintiff International Business Machines Corporation.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Robin H. Gilbert), for plaintiff Advanced Display Manufacturers of America.

Vinson & Elkins L.L.P. (Theodore W. Kassinger, Charles D. Tetrault, and *Rosemary E. Gwynn),* for plaintiff Compaq Computer Corporation.

Pennie & Edmonds (Arthur Wineburg and *Marcia H. Sundeen),* for plaintiff Tandy Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer); Marguerite E. Trossevin,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Lyn M. Schlitt, General Counsel; *James A. Toupin,* Assistant General Counsel, United States International Trade Commission *(Paul R. Bardos* and *Rachele Valente),* for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Robin H. Gilbert), for defendant-intervenor Advanced Display Manufacturers of America.

Jones, Day, Reavis & Pogue (John E. Benedict, David G. Schryver, and *Thomas F. Cullen, Jr.),* for defendant-intervenor Texas Instruments, Inc.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This matter is before the court for review of the final remand determination by the U.S. International Trade Commis-

sion ("ITC" or "Commission") issued pursuant to this court's memorandum opinion and order dated December 29, 1992 (Slip Op. 92–229, 16 CIT ____, 810 F. Supp. 322 (1992)). The ITC issued its remand determination on March 8, 1993. *Certain High-Information Content Flat Panel Displays and Display Glass Therefor From Japan,* Inv. No. 731–TA–469 (Final) (Remand), USITC Pub. No. 2610 (Mar. 1993) *("Remand Determination").*

Upon remand, the Commission determined that an industry in the United States was not materially injured by reason of imports from Japan of electroluminescent ("EL") high-information content flat panel displays ("HIC FPDs" or "displays"). Plaintiff Advanced Display Manufacturers of America ("ADMA") has filed a motion for judgment on the agency record challenging the Commission's negative remand determination, alleging it is not based on substantial evidence in the administrative record, and not in accordance with law.

The court will first examine that portion of the Commission's *Remand Determination* concerning EL displays, and conclude that in this regard the *Remand Determination* is in accordance with law and is supported by substantial evidence. The court therefore denies ADMA's motion and affirms this portion of the *Remand Determination.*

After the ITC filed its *Remand Determination,* the U.S. Department of Commerce ("Commerce") revoked the antidumping duty order on active matrix liquid crystal display ("AMLCD") HIC FPDs from Japan. Commerce's revocation of the antidumping duty order thus renders moot all proceedings concerning AMLCDs. As a result, the court dismisses all complaints in this action pertaining to AMLCDs from Japan. The court further concludes that Commerce's revocation does not require this court to vacate its *Memorandum Opinion and Order* of December 29, 1992, which instructed the ITC to reconsider its determination.

BACKGROUND

This is the latest chapter in the saga of this antidumping investigation of high-information content flat panel displays and display glass therefor from Japan. The proceedings relevant to the present action are summarized and highlighted as follows.[1]

On July 16, 1991, Commerce published its final affirmative determination finding four separate classes or kinds of imported merchandise. Two of these classes, active-matrix liquid crystal displays ("AMLCDs") and electroluminescent HIC FPDs ("ELs" or "EL displays"), were found to be sold at less than fair value. *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (July 16, 1991). Commerce established a weighted average margin of 62.67 percent for all imports of AMLCDs and 7.02 percent for all imports of ELs. *Id.,* 56 Fed. Reg. at 32,401.

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[1] For a more detailed description of the procedural history of this case, see *Hosiden Corp. v. United States,* 16 CIT ___, ___, 810 F. Supp. 322, 325–27 (1992).

The ITC reached a final affirmative injury determination in this investigation on August 26, 1991. *Certain High-Information Content Flat Panel Displays and Display Glass Therefor From Japan,* Inv. No. 731–TA–469 (Final), USITC Pub. No. 2413 (Aug. 1991) *("ITC Final Determination").* The ITC found that all types of HIC FPDs comprised a single domestic like product, which corresponded to more than one class or kind of imported merchandise. *ITC Final Determination* at 7. The ITC determined that the domestic industry which produced the like product had been materially injured by less than fair value ("LTFV") imports of two classes or kinds of merchandise, EL displays and AMLCDs. *ITC Final Determination* at 27. In reaching this determination, the ITC conducted a single material injury analysis that considered the aggregate effects of the two classes or kinds of merchandise on the domestic industry that produced the like product. *ITC Final Determination* at 23–27. Commerce then published antidumping duty orders on imports of AMLCDs and ELs from Japan. *High Information Content Flat Panel Displays and Display Glass Therefor from Japan,* 56 Fed. Reg. 43,741, 43,742 (Sept. 4, 1991). Plaintiffs initiated actions challenging the determinations of both Commerce and the Commission.

On December 29, 1992, this court issued a memorandum opinion and order, in which it remanded this matter to the ITC for reconsideration. *Hosiden Corp. v. United States,* 16 CIT ___, 810 F. Supp. 322 (1992) *("Hosiden I").*[2] The court instructed the ITC to make two separate material injury determinations for domestic producers of the like product corresponding to each class or kind of imported merchandise found by Commerce to be sold at less than fair value, i.e. AMLCDs and EL HIC FPDs. *Hosiden I,* 810 F. Supp. at 331.[3]

On March 8, 1993, the ITC submitted its *Remand Determination* to the court. Four of the six commissioners found that imports of EL displays from Japan had caused no material injury to a domestic industry. *Remand Determination* at II–1, VI–1. ADMA now challenges that negative determination concerning imports of EL displays via its motion for judgment upon the agency record.

The ITC's *Remand Determination* also found by a 3–3 vote that imports of AMLCDs had caused material injury to an industry in the United States. *Remand Determination* at I–1, II–1. Commerce, however, announced on June 25, 1993, its final results of a changed circumstances administrative review, and revoked the antidumping duty order on AMLCDs. *Active Matrix Liquid Crystal High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 58 Fed. Reg. 34,409, 34,414 (June 25, 1993). The period for appealing Commerce's revocation expired without any appeal being filed.

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[2] At the time the court issued its order of remand, the court reserved judgment on the determinations made by Commerce. *Hosiden I,* 810 F. Supp. at 325.

[3] On February 1, 1993 and March 1, 1993, ADMA and the ITC respectively filed notices of appeal with the Court of Appeals for the Federal Circuit. On July 13, 1993, the Federal Circuit dismissed these two appeals, noting that "[r]eview of the issues in the remand order is not simply appropriate at this time." *Hosiden v. United States,* Nos. 93–1224, 93–1269, 1993 U.S. App. LEXIS 19060, at *20 (Fed. Cir. July 13, 1993).

DISCUSSION

A. *ITC's Remand Determination Is In Accordance With Law:*

ADMA challenges the ITC's negative determination regarding EL displays as not being in accordance with law. ADMA does not contend that the ITC failed to follow the court's remand instructions. Rather, ADMA asserts that the ITC's determination is contrary to law because it was based on the allegedly legally erroneous remand instructions handed down by this court. *Memorandum of Advanced Display Manufacturers of America, Et Al. In Support Of Motion For Judgment Upon An Agency Record ("ADMA Brief")* at 10. "The Court's failure to apply a deferential standard of review to the Commission's original findings, followed by the Court imposing its own erroneous framework on the Commission's analysis, was contrary to law and accordingly caused the Commission's remand results to be contrary to law." *Id.* The Commission responded:

> Whether or not this Court's December 29, 1992, order was in error, however, the Commission was required to comply with that order and did so in its determination on remand.

Memorandum of Defendant U.S. International Trade Commission In Response To Private Parties' Comments Concerning The Commission's Remand Determination ("ITC Brief") at 15.

Rather than challenge the ITC's *Remand Determination,* ADMA challenges the court's underlying remand order and opinion in *Hosiden I.* ADMA essentially complains that this court's remand order resulted in an unlawful usurpation of the Commission's discretionary authority. ADMA's disagreement with the court's interpretation of the law set forth in *Hosiden I,* however, is extraneous to the court's present determination of whether the Commission's *Remand Determination* is in accordance with law.[4] At this point in the proceedings, the court is concerned solely with whether the Commission complied with the court's remand instructions. The court finds that the ITC's *Remand Determination* is in compliance with the *Hosiden I* remand order and opinion, and is in accordance with law.

As to ADMA's assertion that this court failed to apply a deferential standard of review to the Commission's *Final Determination,* the court disagrees. As discussed in greater detail in *Hosiden I,* this court fulfilled its statutory duty to assess whether the ITC's original *Final Determination* was "in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). The court respectfully considered the views of the Commissioners expressed in the ITC's *Final Determination.* Deference, however, does not compel a relinquishment of the court's responsibility to conduct meaningful judicial review. *Borlem S.A.-Empreedimentos Industriais v. United States,* 8 Fed. Cir. (T) 164, 168, 913 F.2d 933, 937 (1990). Furthermore, the "'traditional deference courts pay to agency interpretation is

[4]Indeed, several Commissioners expressed their disagreement or concern with the court's remand instructions in *Hosiden I,* but nevertheless submitted their views for the *Remand Determination* in order to comply with the court's instructions.

not to be applied to alter the clearly expressed intent of Congress.'" *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 11 CIT 866, 869, 675 F. Supp. 1354, 1357 (1987) (quoting *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)).

In *Hosiden I*, the court found that the ITC's statutory interpretation was not in accordance with the plain language of the statute. *Hosiden I*, 810 F. Supp. at 328. Title 19 of the United States Code, § 1673 (1988), provides that antidumping duties shall be imposed if:

> **(1)** the administering authority determines that *a class or kind* of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
> **(2)** the Commission determines that—
>
> **(A)** an industry in the United States—
>
> **(i)** is materially injured, or
> **(ii)** is threatened with material injury, or
>
> **(B)** the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of *that merchandise* or by reason of sales (or the likelihood of sales) of *that merchandise* * * *."

19 U.S.C. § 1673 (1988) (emphasis added). This statute clearly refers to "a class or kind of foreign merchandise" as "that merchandise." The modifier "that" specifically limits the Commission's comparisons to those particular imports of "a class or kind" found by Commerce to have been dumped. The statute thus envisions a separate ITC determination for each separate class or kind of merchandise that Commerce determines is being sold in the United States at less than fair value.

The court also acknowledged the established caselaw that supports the Commission's authority to make its own like product determinations. *Hosiden I*, 810 F. Supp. at 329 (citing *Torrington Co. v. United States*, 14 CIT 648, 747 F. Supp. 744 (1990), *aff'd*, 10 Fed. Cir. (T) ____, 938 F.2d 1278 (1991)). *Hosiden I* does not conflict with prior decisions of this court that upheld the Commission's right to find multiple like products within each class or kind of article defined by Commerce. *Id.* (citing *Sony Corp. of America v. United States*, 13 CIT 353, 712 F. Supp. 978 (1989); *American NTN Bearing Mfg. Corp. v. United States*, 14 CIT 320, 739 F. Supp. 1555 (1990)).

Furthermore, *Hosiden I* does not preclude the Commission from cumulating the effects of the different classes or kinds of merchandise identified by Commerce. 19 U.S.C. § 1677(7)(C)(iv) clearly authorizes the ITC to cumulate the volume and effect of dumped imports subject to investigation. *Cf. Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) 101, 108, 901 F.2d 1097, 1103 (1990). This, however, is different from cumulating multiple classes or kinds of merchandise identified by Commerce. As Commissioner Brunsdale noted, *Hosiden I* recognized that under the statutory framework, when Commerce finds multiple classes or kinds of merchandise, the Commission is to make multiple determinations. *Remand Determination* at IV–9. Such a finding does not

require the Commission to find multiple like products or multiple domestic industries; it does, however, require multiple determinations. *Id.* Rather than define a single like product corresponding to cumulated classes or kinds of merchandise, the Commission may choose to define a single like product that corresponds to each class or kind of merchandise determined to exist by Commerce. In this scenario, the Commission would then make multiple comparisons of the single like product against each class or kind of merchandise. Clearly, this analytical framework does not eviscerate the Commission's authority to cumulate, as provided by 19 U.S.C. § 1677(7)(C)(iv).

As noted in *Hosiden I,* cumulation of two or more classes or kinds of articles increases the diversity of merchandise for which the Commission seeks to find a "like product." *Hosiden I,* 810 F. Supp. at 330. In certain situations, the totality of characteristics of cumulated classes or kinds of merchandise would not differ significantly from the characteristics of each class or kind viewed separately. *Id.* However, in other cases, the cumulation of multiple classes or kinds of merchandise may very well result in an expanded definition of "like product;" correspondingly, the expanded definition of the domestic industry would then lead to a skewed causation determination. *Id.* Indeed, it is a result such as this which is not "in accordance with law." 19 U.S.C. § 1516a(b)(1) (1988). In sum, then, a plain reading of the specific language of 19 U.S.C. § 1673 indicates that the Commission is required to make separate material injury determinations corresponding to each class or kind of merchandise found by Commerce to have been sold in the United States at less than fair value.

B. *ITC's Remand Determination Is Supported By Substantial Evidence:*

ADMA argues that the Commission's negative EL determination is not based on substantial evidence. More specifically, ADMA challenges Commissioner Nuzum's remand determination as unsupported by substantial evidence in the record. Commissioner Nuzum joined Vice Chairman Watson and Commissioners Brunsdale and Crawford in finding that imports of EL displays from Japan did not cause material injury or a threat of material injury to a domestic industry. ADMA ignores the findings of the three other commissioners who voted in favor of the negative injury determination, and focuses its arguments on the findings of Commissioner Nuzum.

In support of its argument that Commissioner Nuzum's findings are not supported by substantial evidence, ADMA offers two general arguments. First, ADMA contrasts Commissioner Nuzum's findings to the contrary findings of Chairman Newquist and Commissioner Rohr. *ADMA Brief* at 5–7. Merely highlighting the contrary views expressed by a minority of Commissioners, however, is an insufficient basis for demonstrating that the views of the majority of Commissioners are not supported by substantial evidence. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evi-

dence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (quoted in *Matsushita Elec. Ind. Co. v. United States,* 3 Fed. Cir (T) 44, 51, 750 F.2d 927, 933 (1984)).

ADMA also generally asserts that Commissioner Nuzum "appears to have ignored" certain evidence in the administrative record in making her findings. *ADMA Brief* at 5. ADMA's assertions are unfounded. All of the Commissioners, including Commissioner Nuzum, are presumed to have considered all of the evidence in the administrative record in reaching their determinations. *Metallverken Nederland B.V. v. United States,* 13 CIT 1013, 1021, 728 F. Supp. 730, 736 (1989). ADMA appears to confuse the issue of whether Commissioner Nuzum *considered* the information, with whether she *discussed* that information. In order to determine whether the views of Commissioner Nuzum and the majority of Commissioners are supported by substantial evidence, the court will review the ITC majority's determination concerning the subject EL imports, focusing on the volume of EL imports, the price effects of EL imports, and the impact of EL imports on the domestic industry.[5]

1. Volume

A majority of the Commissioners found that the volume of EL imports from Japan decreased over the period of investigation ("POI"), both in absolute terms and relative to domestic consumption. *Remand Determination* at II–11, VI–1 to VI–2. The majority concluded that they "[did] not find the volume or any increase in volume of subject imports to be significant." *Id.* at II–12. Commissioner Nuzum specifically concluded that:

> Given the small size of the market accounted for by subject EL imports [and] the overall decrease in the volume of these imports in absolute terms and relative to domestic consumption and production, * * * I cannot say that I find the volume of imports of EL FPDs to be significant.

Remand Determination at VI–2 to VI–3. ADMA argues that the "enormous significance" of the volume of subject EL imports, relative to U.S. producers' shipments of HIC FPDs, demonstrates the unreasonableness of Commissioner Nuzum's finding that the volume of EL imports was insignificant. *ADMA Brief* at 5–6. ADMA's argument is unfounded.

The record clearly indicates that the subject EL imports accounted for only a small share of domestic consumption of HIC FPDs. In absolute unit volume terms, the quantity of EL display imports from Japan was lower at the end of the POI, i.e. [ ] units in 1990, than at the beginning of the POI, i.e. [ ] units in 1988. *Staff Final Report to the Commission on Investigation No. 731–TA–469* (Final) (Aug. 5, 1991) at A–133 (Table 35) *("Staff Report").*

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[5] 19 U.S.C. § 1677(7)(B)(i) provides that the Commission shall consider the volume of subject imports, the effect of subject imports on prices in the U.S. for like products, and the impact of such imports on the domestic producers of like products. 19 U.S.C. § 1677(7)(B)(ii) further provides that the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports."

Commissioner Nuzum joined Chairman Newquist and Commissioner Rohr in expressing the majority view on the issues of like product, domestic industry, and condition of the industry. *Remand Determination* at I–3 to I–15, VI–1. ADMA does not challenge these aspects of Commissioner Nuzum's EL determination.

In relative market share terms, the quantity of U.S. shipments of Japanese EL displays accounted for only [ ] percent of the total U.S. market for EL displays in 1990, down from [ ] percent in 1988. *Staff Report* at A–140 (Table 38). Similarly, the U.S. market share of Japanese EL displays, measured by value, decreased from [ ] percent in 1988 to [ ] percent in 1990; this represents a decrease over the POI of nearly [ ] percent. *See id.* The insignificance of the volume of EL display imports from Japan is further highlighted when compared with overall U.S. consumption of all HIC FPDs. EL display imports from Japan represented approximately [ ] percent of all HIC FPDs consumed in the United States during the POI.[6]

In sum, the record indicates that the volume of imports of EL displays from Japan decreased over the POI, represented less than [ ] percent of the domestic EL display market by 1990, and accounted for a mere [ ] percent of total HIC FPD consumption in the United States during the POI. The court thus finds that the ITC's determination that the volume of EL imports was not significant is supported by substantial evidence in the record.

2. Price Effects

A majority of the Commission found that EL imports did not cause significant price suppression. *Remand Determination* at II–14, VI–4. Commissioner Nuzum specifically noted that, given the limited amount of price data on the FPD industry and market, she was "especially careful to closely examine the complete record for other evidence of a causal link between subject EL imports and the condition of the domestic industry." *Id.* at VI–4.

The court finds that the majority's finding regarding price effects is supported by substantial evidence. The record indicates that pricing data was sparse and of limited usefulness in part because different models of EL displays tend to be customized. *Staff Report* at A–173. Despite the serious difficulties in making price comparisons, the ITC did conduct price comparisons for two types of EL displays, i.e. 640 × 200 EL displays and 640 × 400 EL displays, and discovered both underselling and overselling by importers of the subject merchandise.[7] *Staff Report* at A–179. The limited data is thus inconclusive of any pattern of underselling by foreign producers.

In sum, viewing the limited pricing data available in light of the overall record, and accounting for instances of overselling by imports and the fluctuating and rising price trends, the majority of Commissioners, including Commissioner Nuzum, reasonably concluded that the subject

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[6] Apparent domestic consumption of all HIC FPDs was [ ] *Staff Report* at A–137 (Table 37). Imports of EL displays from Japan amounted to [ ] *Staff Report* at A–133 (Table 35).

[7] With regard to 640 × 200 EL displays, prices for domestic displays [ ] over time, while prices for displays from Japan [ ]. Staff Report at A–179, A–180 (Tables 44 and 45).

With regard to 640 × 400 EL displays, prices of both domestic and Japanese displays [ ] during the period of investigation. *Id.*

EL imports did not have significant price effects. The statutory standard of significant price undercutting is not met when the ITC finds a mixed pattern of underselling and overselling. *Cooperweld Corp. v. United States*, 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988). The court finds that the record reveals no pattern of underselling by Japanese EL display producers, and further finds a lack of evidence supporting ADMA's allegation of price suppression or depression.

3. Impact on the Domestic Industry

A majority of Commissioners also found that Japanese imports of EL displays did not have an impact on the condition of the domestic industry sufficient to merit an affirmative material injury determination. *Remand Determination* at II–14, VI–6.

Commissioner Nuzum noted that, although the record contained evidence of one sale being lost to subject imports, that lost sale had little more than a *de minimis* effect on the domestic industry. *Id.* at VI–5. Commissioner Nuzum emphasized that, when compared to the trends for domestic producers' shipments and for shipments of certain other imports, the subject EL imports had only a very minor, stable, presence in the domestic market. *Id.* Commissioner Nuzum thus concluded that insufficient evidence existed demonstrating a causal link between the subject EL imports and the condition of the domestic industry such that an affirmative injury determination was unwarranted. *Remand Determination* at VI–6.

ADMA contends that Commissioner Nuzum ignored "numerous" other examples of lost sales and lost revenues contained in the record. *ADMA Brief* at 6. All but one of these examples, however, amount to ADMA allegations which were never confirmed by the ITC. *Staff Report* at A–182 to A–195. Furthermore, the lone confirmed lost sale involved no more than [ ] units for which the domestic price would have been [ ] per unit. *Staff Report* at A–182 to A–183. The maximum loss to the domestic industry would have equaled [ ] or [ ] percent of the total value of domestic industry shipments in 1989.[8] The court finds that Commissioner Nuzum's characterization of this lost sale as *de minimis* was reasonable, in light of the amount of potential revenue involved and the lack of any other confirmed lost sales.

Based on the foregoing analysis, the court finds that the ITC's *Remand Determination* regarding EL displays from Japan is in accordance with law, and that the majority's determination is supported by substantial evidence. Thus, the court affirms the ITC's determination that a domestic industry was not materially injured or threatened with material injury by reason of the subject EL imports.

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[8] Total 1989 domestic industry shipments amounted to [ ]. *Staff Report* at A–78 (Table 12).

C. *Effect of Revocation of AMLCD Antidumping Duty Order On Hosiden I:*

Commerce revoked the antidumping duty order covering AMLCDs, effective June 25, 1993. *Active Matrix Liquid Crystal High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 58 Fed. Reg. 34,409, 34,414 (June 25, 1993). The period for appealing Commerce's revocation expired without any appeal being filed.

Plaintiffs had previously challenged the Commission's final affirmative determination with respect to AMLCDs because that determination led to the imposition of an antidumping duty order by Commerce on the importation of AMLCDs. Plaintiff Sharp states that "[i]n light of Commerce's unchallenged determination to revoke the antidumping duty order on AMLCDs from Japan, there is no longer a case or controversy with regard to that order, and any challenges previously addressed to that order are now moot." *Submission Of Plaintiff Sharp Corporation Addressed To Remand Determination Of The United States International Trade Commission* at 2.

The Commission agrees with plaintiff Sharp's statement that Commerce's revocation has rendered moot the proceedings concerning AMLCDs. The ITC, however, further argues that:

> This Court should not only dismiss those portions of plaintiffs' complaints relating to AMLCDs, but should also vacate the Court's memorandum opinion and order of December 29, 1992, except insofar as the order instructs the Commission to evaluate subject imports of EL displays.

ITC Brief at 8. The ITC contends that the basis for the court's decision was the existence of two classes or kinds of imported merchandise found to be sold at less than fair value. Given that Commerce revoked the antidumping duty order on AMLCDs, only one class or kind of dumped merchandise remains under investigation, i.e. EL displays. It is impossible to consider the combined effects of multiple classes or kinds of merchandise when there is only one class or kind of merchandise under investigation. Therefore, according to the ITC, "any case or controversy as to whether the Commission may consider the combined effects of two classes or kinds of dumped merchandise on a domestic industry is ended." *Id.*

The court notes that Article III courts "'lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.'" *PPG Indus., Inc. v. United States,* 11 CIT 303, 306, 660 F. Supp. 965, 968 (1987) (quoting *Iron Arrow Honor Society v. Heckler,* 464 U.S. 67, 70 (1983)). A revocation determination by Commerce which is not timely challenged voids the underlying antidumping duty order, and renders moot any pending challenges to such an order. *Asahi Chem. Indus. Co. v. United States,* 13 CIT 987, 992, 727 F. Supp. 625, 629 (1989). Because Commerce has revoked the antidumping duty order for AMLCDs, issues pertaining to AMLCDs in this proceeding are

now moot and need not be addressed in this opinion. Thus, the court dismisses all pending challenges concerning AMLCDs.

The court, however, disagrees with the Commission's argument that Commerce's revocation also requires the court to vacate its *Hosiden I* decision. The sequence of events in this case demonstrates that vacatur of the *Hosiden I* decision and accompanying remand order is inappropriate. This court issued its Memorandum Opinion and Order in *Hosiden I* on December 29, 1992, instructing the ITC to conduct separate injury analyses for two classes or kinds of merchandise: EL displays and AMLCDs. On March 8, 1993, in response to the *Hosiden I* decision and remand order, the Commission issued its *Remand Determination*. On June 25, 1993, Commerce published its final determination to revoke the antidumping duty order on AMLCDs. Having already submitted its *Remand Determination* in response to this court's order, the ITC now asks the court to perform a legal sleight of hand by vacating the very order upon which that *Remand Determination* rests. The ITC essentially asks this court to vacate an order with which it has already complied, as well as the decision that guided the Commission's own disposition of the EL material injury investigation that is presently before the court.

The ITC argues that "if the Commission had known about Commerce's decision to revoke, it would never have considered imported AMLCDs as being subject to its final determination at all." *ITC Brief* at 14. The court refuses to speculate as to what the Commission might have done had the Commission considered Commerce's revocation decision. The fact remains that the Commission's *Remand Determination* was submitted to the court before Commerce revoked the antidumping duty order on AMLCDs.

The Commission errs in asserting that Commerce's revocation has rendered the entire proceeding governed by *Hosiden I* moot. The *Hosiden I* decision is still very much a "live" case because the portion of the Commission's *Remand Determination* that explicitly addresses the pending EL order is the direct result of the explicit language of the court's *Hosiden I* decision. There is no way to separate the pending antidumping order on EL displays from the *Hosiden I* decision. The court finds no reason to vacate the order upon which the *Remand Determination* rests.

In support of its argument that the court must vacate *Hosiden I* for mootness, the Commission cites several cases, i.e. *Canadian Meat Council v. United States,* 12 CIT 108, 680 F. Supp. 390 (1988); *Babcock & Wilcox Co. v. United States,* 4 CIT 3, (1982); *Associated Dry Goods Corp. v. United States,* 3 CIT 1, 533 F. Supp. 1343 (1982), *vacated,* 69 C.C.P.A. 169, 682 F.2d 212 (1982). *ITC Brief* at 10–12. The present case is clearly distinguishable from the cases cited by the ITC in one significant aspect; specifically, in contrast to the cases cited by the government, the Com-

mission has already acted in response to, and fully complied with, this court's remand instructions in *Hosiden I*.[9]

The Commission also relies upon *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), in support of its request for vacatur of *Hosiden I*. *ITC Brief* at 8–9. Vacatur is warranted in order to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. As in Babcock & Wilcox, however, no final determination on the merits has yet been rendered in this case. *See Babcock & Wilcox*, 4 CIT at 5. The *Hosiden I* remand order and opinion did not compel a particular result on remand, nor did it unquestionably terminate the action before this court. Thus, *Hosiden I* is not a final judgment on the merits with associated *res judicata* effect. Indeed, the Federal Circuit recognized as much when it denied the petitions of ADMA and the ITC for appeal of the *Hosiden I* remand order. *Hosiden Corp. v. United States*, Nos. 93–1224, 93–1269, 1993 U.S. App. LEXIS 19060, at *20 (Fed. Cir. July 13, 1993) ("Review of the issues in the remand order is not simply appropriate at this time.").

Though the ITC may disagree with the *Hosiden I* decision, the fact remains that the ITC's *Remand Determination* has already been issued; the very existence of the *Remand Determination* exposes the logical fallacy undermining the ITC's argument for vacatur. The case before the court has not become entirely moot. The *Hosiden I* decision is a necessary underpinning to the ITC's *Remand Determination*, which is presently before the court for review. The government's motion for vacatur is therefore denied.

Conclusion

For the reasons set forth above, the court affirms the ITC's *Remand Determination* that a domestic industry was not materially injured or threatened with material injury by reason of subject EL imports. All issues pertaining to AMLCDs have been rendered moot by Commerce's revocation of the underlying antidumping duty order; therefore, the court dismisses all pending challenges concerning AMLCDs. Judgment will be entered accordingly.

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[9] In *Canadian Meat Council*, at the time that the court's review of Commerce's determination became moot, Commerce had not yet complied with the terms of the remand order. The court therefore vacated the remand order, recognizing that "[t]he remand ordered in [the court's prior review of Commerce's determination] is not necessary." *Canadian Meat Council*, 12 CIT at 112, 680 F. Supp. at 393. In *Babcock & Wilcox*, the remand order vacated by the court was similarly an order with which the Commission had yet to comply. *Babcock & Wilcox*, 4 CIT at 4–7 (filing of a new antidumping petition pursuant to a stipulated agreement between the parties rendered the pending remand order before the Commission superfluous). The contrast to the present case is clear; having already issued its *Remand Determination*, the ITC's mootness argument is thus undermined.

(Slip Op. 94–61)

PERSICO PIZZAMIGLIO, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND LACLEDE STEEL CO., DEFENDANT-INTERVENOR

Court No. 92–11–00783

[Plaintiff's motion for judgment on the agency record is denied. Final determination of the U.S. Department of Commerce, International Trade Administration, is sustained in all respects. Judgment entered for defendant.]

(Dated April 14, 1994)

Law Offices of Royal Daniel, III (Royal Daniel, III and *Jeri Beth Katz)*, for plaintiff.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz)*; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Tom Ehr)*, of counsel, for defendant.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This matter comes before the court on plaintiff's motion, pursuant to USCIT Rule 56.2, for judgment on the agency record. Plaintiff, Persico Pizzamiglio, S.A. ("Persico"), challenges the decision of the United States Department of Commerce ("Commerce") to use best information available ("BIA") for determining the dumping margin established in *Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from Brazil*, 57 Fed. Reg. 42,940 (Sept. 17, 1992) *("Final Determination")*. Additionally, Persico challenges Commerce's reliance upon unverified petition data as BIA. Commerce and defendant-intervenor, Laclede Steel Co. ("Laclede"), argue that resorting to BIA was appropriate, and that Commerce properly used unverified petition data to establish the dumping margin for Persico. The court finds that substantial evidence exists in the record to support Commerce's use of BIA, and that Commerce acted in accordance with law when it chose unverified petition data as BIA. The court therefore denies Persico's motion for judgment on the agency record, and sustains Commerce's final determination in all respects.

BACKGROUND

Commerce initiated its investigation of circular welded nonalloy steel pipe from Brazil on October 15, 1991. *Initiation of Antidumping Duty Investigations: Circular Welded Non-Alloy Steel Pipe From Brazil the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela*, 56 Fed. Reg. 52,528 (Oct. 21, 1991) *("Initiation of AD Investigations")*. The scope of Commerce's investigation covered pipes and tubes that are circular welded non-alloy steel, of circular cross-section, not more than 406.4 millimeters (i.e. 16 inches) in outside diameter. *Id.* Persico was the only Brazilian company subject to Commerce's investigation, because Persico accounted for over 60 percent of all exports of the subject merchandise to the United States during the period of investigation ("POI"), which spanned from April 1, 1991 to September 30, 1991. Com-

merce provided Persico with an antidumping questionnaire seeking information about Persico's business activities during the POI. The questionnaire was divided into three sections. Persico submitted a response for Section A on December 20, 1991, and submitted responses to Sections B and C on January 13, 1992.

Petitioners alleged on February 24, 1992, that during the POI, Persico had sold the subject merchandise in the home market at prices below cost of production ("COP"). In response to these allegations, on March 19, 1992, Commerce issued Persico a COP and constructed value ("CV") questionnaire. Persico's response to this questionnaire was originally due to be filed with Commerce by April 16, 1992; Commerce granted Persico an extension, however, to May 1, 1992.

On April 28, 1992, Commerce published its preliminary determination and postponement of final determination. *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Circular Welded Non-Alloy Steel Pipe From Brazil,* 57 Fed. Reg. 17,883 (Apr. 28, 1992). The preliminary determination did not address the issue of home market sales below cost of production because Persico had not yet responded to the COP and CV questionnaire as of the date of publication of this notice in the Federal Register. Commerce calculated a preliminary duty margin for Persico of 2.66 percent *ad valorem*. Persico responded to the COP and CV questionnaire on May 1, 1992. Commerce then sent Persico a deficiency letter on June 11, 1992, informing Persico of "significant deficiencies" in its response to the COP and CV questionnaire. P.R. Doc. 119. Persico responded to the issues addressed by Commerce in its deficiency letter on June 18, 1992.

Commerce conducted verification of Persico's responses to the questionnaires from June 28, 1992 through July 1, 1992 at Persico's headquarters in Brazil. The scope of cost verification included Persico's submitted COP/CV responses and difference-in-merchandise data for the circular welded non-alloy steel pipe sold in the home market and in the United States during the POI. During cost verification, Commerce noted eight issues that it thought might require further consideration. *Cost Verification Report,* P.R. Doc. 134 at I.

During price verification Commerce discovered that, in its response, Persico did not include information about home market sales of mechanical tubing and structural pipe, although both classes of merchandise could be included within the scope of Commerce's investigation, depending upon their use. P.R. Doc. 135 at 10. Commerce defined the scope of its investigation as pipes and tubes that are "generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications." *Initiation of AD Investigations,* 56 Fed. Reg. at 52,529. The applications Commerce referred to are "the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, * * * other related uses * * * [and] light load-bearing and mechanical applications, such as for fence tub-

ing." *Id.* Commerce ultimately concluded that neither mechanical tubing nor structural pipe would be used for product matching because Persico did not export this merchandise to the United States.

Commerce also discovered a discrepancy between the amount of export sales to the United States that Persico reported in its response, and the amount of such sales indicated in Persico's accounting records. Specifically, Commerce selected two export sales from the month of July 1992 to determine whether they were reported in Persico's response for U.S. sales. Purchase Order 654817 had not been reported. P.R. Doc. 135 at 12. Commerce subsequently determined that it should have been reported. The second purchase order that Commerce selected had been canceled by an internal memo. *Id.* at 12–13. Consequently, Commerce selected two additional export sales from July; upon examination, each of these were also determined to have been canceled. *Id.* at 13. Commerce then requested that Persico generate a report of all its export sales to the United States during the POI. This report listed a different amount of standard pipe sold in the United States than the amount Persico had previously reported to Commerce in its questionnaire response. The report showed that as many as one-third of Persico's U.S. sales during the POI may not have been reported. *Final Determination,* 57 Fed. Reg. at 42,941. Persico explained that certain canceled sales were later re-entered with different purchase order numbers. P.R. Doc. 135 at 13. Commerce could not confirm this, and could not adjust the total sales figure listed in the generated report to account for this assertion. As a result, Commerce could not verify Persico's questionnaire response regarding its total quantity of sales to the United States during the POI.

This dilemma concerning U.S. sales verification consumed a substantial amount of the three days Commerce had allocated for verification. Because of time constraints, Commerce was unable to verify Persico's methodology for converting net home market prices to a theoretical weight basis. *Id.* at 15. Conversion is necessary because Persico sells pipe in the home market on an actual weight basis, while it sells pipe in the United States on a theoretical weight basis. Conversion allows Commerce to compare home market prices with United States prices. In addition, Commerce had enough time to examine supporting sales documentation for only one U.S. sale and one home market sale The delays involved led Commerce to the conclusion that:

> Because of the difficulty we encountered throughout the verification when trying to verify the more general information (including total volume and value and completeness), we were unable, in the time allotted, to conduct a complete verification of any of the sales traces (including the charges and adjustments), or to return to the issue of the conversion from an actual weight basis to a theoretical weight basis.

Id. at 18. Furthermore, Commerce requested documentation for Persico's calculation of home inland freight expenses. Persico never complied with this request during verification. *Id.*

After verification, Richard W. Moreland[1] issued an internal Commerce Department memorandum to Francis J. Sailer,[2] discussing the events of verification. P.R. Doc. 144 at 4–5. Citing the difficulty that Commerce encountered during verification, and the substantial lack of verification of Persico's response in support for his recommendation, Mr. Moreland recommended that BIA be used for determining Persico's final dumping margin. It is evident from the record that Mr. Moreland was not present at verification.

On September 17, 1992, Commerce issued its final determination, establishing an *ad valorem* dumping margin for Persico of 103.38 percent for the subject merchandise. This rate was computed using a "cooperative respondent" BIA rate, which was composed of the *average* of the calculated margins in the petition. *Final Determination,* 57 Fed. Reg. at 42,942. Persico now challenges that result before this court.

Discussion

According to statute, the court must affirm Commerce's determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is that which a reasonable mind may accept as sufficient to support a conclusion. *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (citing *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The court will thus affirm Commerce's determination if it finds that a reasonable mind could extract the same conclusion from all of the evidence presented in the record. *Negev Phosphates, Ltd. v. United States Dep't of Commerce,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988).

A. *Commerce's Decision to Use BIA is Substantially Supported by the Record:*

In its final determination, Commerce stated that it had "determined that the questionnaire responses of the respondent provide an inadequate basis for estimating dumping margins. * * * [F]or the information we examined at verification, the omissions from and inaccuracies in the responses were so material as to make the responses inherently unreliable, compelling the Department to use BIA." *Final Determination,* 57 Fed. Reg. at 42,941. The court finds that there is substantial evidence in the record to support this conclusion.

At verification, Commerce discovered that Persico did not submit any data regarding home market sales of mechanical tubing or structural pipe in its questionnaire response, although certain sales of these goods may have been included within the scope of Commerce's investigation. P.R. Doc. 135 at 10. Persico stated that it did not include mechanical tubing or structural pipe sales data in its response because these goods are "inappropriate for use in conducting fluids." *Id.* This statement ignores

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[1] Mr. Moreland is the Director of the Office of Antidumping Investigations, U.S. Department of Commerce, International Trade Administration.

[2] Mr. Sailer is the Deputy Assistant Secretary for Investigations, U.S. Department of Commerce, International Trade Administration.

other applications for which mechanical tubing and structural pipe could be used, applications that fall under the scope of Commerce's investigation. In fact, Persico later conceded that mechanical tubing might be used in construction for fence tubing. Although Persico did not know whether any of its customers used mechanical pipe for such applications, it offered no other evidence supporting its claim that its sales of mechanical tubing or structural pipe were outside the scope of Commerce's investigation. *Id.*

The court finds that Persico's response to Commerce's request for all home market sales of the subject merchandise during the POI was incomplete. The fact that Commerce later recognized that the requested information would not be used in product matching is irrelevant to the court's analysis. Commerce requested information which the respondent should have *fully* provided upon request. "It is Commerce, not the respondent that determines what information is to be provided * * *." *Ansaldo Componenti, S.p.A v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). If the court were to hold otherwise, "alleged unfair traders would be able to control the amount of antidumping duties by selectively providing [Commerce] with information." *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) 69, 76, 899 F.2d 1565, 1572 (1990). Persico should have conclusively reported to Commerce whether any of its home market sales of mechanical tubing or structural pipe were within the scope of the investigation; any ambiguity should have been resolved through consultation with Commerce before the time Persico's response was due. If certain categories of merchandise were determined to be within the scope of Commerce's investigation, Persico should have supplied Commerce with information regarding sales of such merchandise. Because Persico did not conclusively state the amount, if any, of its home market sales of mechanical tubing or structural pipe that were included within the scope of Commerce's investigation, Commerce could not verify Persico's home market sales of the subject merchandise. Commerce cannot be left to the largesse of a party to supply information. *Id.,* 899 F.2d at 1571.

At verification, Commerce was also unable to verify Persico's response for its total U.S. sales of the subject merchandise; in fact, Commerce discovered the possibility that not all U.S. sales of the subject merchandise during the POI were included in Persico's questionnaire response. As noted, Commerce found that Purchase Order 654817 was not recorded in Persico's response. Commerce then examined the commercial invoice for this purchase order and concluded that Persico should have reported it as a U.S. sale during the POI. P.R. Doc. 135 at 12. Because of the discrepancy between the amount of U.S. sales stated on the report generated at verification and the amount stated in Persico's response to Commerce's questionnaire, Commerce could not verify Persico's response pertaining to the quantity of U.S. sales of the subject merchandise.

The court notes that the controlling statutory provision states in pertinent part:

> **(b) Verification**
> The administering authority shall verify all information relied upon in making—
> (1) a final determination in an investigation * * *. If the administering authority is unable to verify the accuracy of the information submitted, it *shall use* the *best information available* to it as the basis for its action, which may include, in actions referred to in paragraph (1), the information submitted in support of the petition.
> **(c) Determinations to be made on best information available**
> In making their determinations under this subtitle, the administering authority and the Commission *shall,* whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, *use the best information otherwise available.*

19 U.S.C. § 1677e (1988) (emphasis added). According to this statute, Commerce *shall* use BIA if: it cannot verify information submitted by a respondent; a respondent refuses or is unable to respond to Commerce's questions in a timely manner or in the form required by Commerce; or, a respondent significantly impedes Commerce's investigation.[3] *See NSK Ltd. v. United States,* 16 CIT ____, ____, 798 F. Supp. 721, 726 (1992). In this case, the court finds that Commerce's use of BIA was in accordance with law. The record indicates that Commerce could not verify substantial portions of Persico's response. Most notably, Commerce could not verify the quantity of Persico's U.S. sales during the POI, or Persico's methodology used to convert actual weight prices to theoretical weight prices. Because Commerce could not verify the accuracy of the information submitted by Persico, § 1677e(b) authorizes Commerce's use of BIA.

Furthermore, Persico refused to supply Commerce with requested documentation for home market foreign inland freight expenses. Persico's response to Commerce's inquiry into home market sales was similarly incomplete. These facts also justify the use of BIA as a refusal or inability to produce information requested in a timely manner and in the form required. Our appellate court has previously held that "if the responses provided to an information request are only partially complete in that not all questions requiring a response are answered or

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[3] Consistent with 19 U.S.C. § 1677e, federal regulations provide that:

(a) *Use of best information available.* The Secretary will use the best information available whenever the Secretary:
(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
(2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.
(b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties, as defined in paragraph (k)(3), (k)(4), (k)(5), or (k)(6) of § 353.2. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

19 C.F.R. § 353.37 (1993).

answers to questions do not fully or accurately supply the information requested, partial completeness * * * may justify resort to the best information rule." *Olympic Adhesives,* 8 Fed. Cir. (T) at 76, 899 F.2d at 1572. In this case, as demonstrated above, many of Persico's answers to Commerce's questionnaire were either incomplete or inaccurate, thus justifying resort to BIA.

Persico does not argue any of these factual points. Instead, Persico argues that Commerce was incorrect to use BIA because it relied on Mr. Moreland's memorandum in its decision to resort to BIA. Persico claims that Mr. Moreland's memorandum portrays a totally inaccurate account of the events Commerce encountered at verification. Persico urges that because Mr. Moreland did not attend verification, his memorandum cannot be considered as part of the record, and that Commerce should have ignored it in deciding to use BIA. Persico seems to imply that if Mr. Moreland's memorandum were not included in the record, Commerce would not have decided to use BIA. Therefore, according to Persico, Commerce's decision should be vacated. *Plaintiff's Memorandum of Law In Support of Motion for Judgment on the Agency Record ("Persico's Brief")* at 3. Persico offers no case law to support this novel argument.

Alternatively, Persico argues that Commerce had a duty to devote a longer period of time for verification of Persico's response. Persico argues that the reason why Commerce could not verify its response was because Commerce did not devote enough time to the verification process. *Persico's Brief* at 4–6. Persico thus faults Commerce, rather than its own defective response, for Commerce's inability to verify portions of Persico's response. The court finds neither of these arguments persuasive. Each will be addressed in turn.

1. Mr. Moreland's memorandum

The court notes that Mr. Moreland's memorandum is not essential to support Commerce's decision. All the evidence that Commerce required to support its decision in this case is contained within the verification reports.[4] Persico's argument as it pertains to Mr. Moreland's memorandum thus appears groundless. A post-verification summary memorandum of events that occurred at verification is not the basis for Commerce's decision to employ BIA. The memorandum merely reflects the *facts* which are themselves the basis for using BIA. Persico's attempt to elevate the importance of the post-verification memorandum in this case is inaccurate and unfounded. Because the court finds adequate support in the verification reports for employing BIA, the court finds Persico's argument pertaining to Mr. Moreland's memorandum unpersuasive.

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[4]This is not to say that Mr. Moreland's memorandum is inaccurate. Quite to the contrary, Mr. Moreland's memorandum appears to be an accurate summary of the events and difficulties Commerce encountered at verification. In the section of Mr. Moreland's memorandum entitled "Recommendation", Mr. Moreland states:

> Due to the significant discrepancies in the data submitted by Persico, we are unable to determine the total volume of Persico's U.S. sales during the POI. In addition, we cannot determine the completeness of Persico's reported home market sales, which is necessary to properly conduct the cost of production analysis. Our ability to calculate a margin for Persico is further hampered by the fact that sales-specific information remains unverified. Therefore, we recommend basing Persico's final determination margin on BIA.

P.R. Doc. 144 at 4.

2. Duration of verification

Persico argues that Commerce improperly devoted insufficient time for verification, and therefore, Commerce is to blame for its failure to perform a complete verification of Persico's response. Persico further argues that because Commerce is at fault for the lack of verification, BIA should not be used in this case. In support of this position, Persico cites the *Antidumping Manual* published by the U.S. Department of Commerce, International Trade Administration, for the proposition that Commerce's guidelines anticipate conducting price verification for five days, not including a one-day tour of the plant.[5] In this case, Commerce conducted verification for three days, excluding one day for a tour of the plant. Again, Persico does not offer any legal precedent in support of its argument against use of BIA in this case.

Ironically, on the same page of the *Antidumping Manual* that Persico cites for the proposition that Commerce anticipates a five-day verification, Commerce also states that "[d]ue to the number of investigations we are presently conducting, our current practice is to allow 3 working days for overseas verification * * *." Commerce's policy seems to favor five-day overseas verifications, but due to the current number of investigations and associated time constraints, Commerce has decided to conduct overseas verifications in three days. There is no statutory mandate as to how long the process of verification must last. Rather, Commerce is afforded discretion when conducting a verification pursuant to 19 U.S.C. § 1677e(b). The court notes that:

> [I]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation * * *. [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1983). The court holds that Commerce's general practice in conducting overseas verifications is reasonable, considering the time and resource constraints that the agency faces. Additionally, it appears from a review of the record that Commerce would have completed verification had it not been for Persico's defective response regarding U.S. sales of the subject merchandise. Therefore it is Persico, not Commerce, which is at fault for the lack of verification of Persico's response. Persico's attempt to avoid BIA by placing blame for the lack of verification on Commerce is thus without merit.

B. *Commerce's Reliance Upon Petition Information as BIA:*

Persico argues that Commerce erred by using unverified petition information as BIA. Instead, Persico argues that Commerce should have at least relied upon information from the portions of Persico's response that Commerce had verified. The court rejects this argument.

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[5] U.S. Department of Commerce, International Trade Administration, *Antidumping Manual*, Ch. 13 at 1 (Aug. 1991).

A similar argument was rejected by the court in *Rhone Poulenc, Inc. v. United States,* 13 CIT 218, 710 F. Supp. 341 (1989), *aff'd,* 8 Fed. Cir. (T) 61, 899 F.2d 1185 (1990); *see also Chinsung Indus. Co. v. United States,* 13 CIT 103, 705 F. Supp. 598 (1989)(on similar facts, the court held that Commerce's disregard for verified information was in accordance with law). In *Rhone Poulenc,* Commerce conducted an administrative review of a preexisting dumping order, and issued the respondent a questionnaire pertaining to the review period. Commerce summarily rejected the respondent's entire submission because it was not in Commerce's required format, and because the respondent did not provide certain requested data. As a result, Commerce decided to use BIA. The respondent argued before this court that Commerce should only use BIA for missing information, and should not use BIA *in toto.* In upholding Commerce's actions, the court stated that "[t]he Court is unpersuaded by plaintiff's argument for a rule prohibiting Commerce from rejecting any submission that is 'substantially complete.' Such a substantiality test might place control of the results of an administrative review in the hands of respondents by permitting them selectively to provide information requested." *Id.* at 224, 710 F. Supp. at 346.

This court agrees with the view expressed by the court in *Rhone-Poulenc.* If the court were to accept Persico's argument, such result might encourage respondents to analyze the information Commerce would employ as BIA should that agency ignore a questionnaire response for being unresponsive or incomplete. Presumably, the respondent would then selectively disclose only that information which would decrease a dumping margin calculated from BIA. Under this framework, a respondent would never disclose any information that would actually raise the dumping margin that would otherwise be established by employing BIA. In this way, it would be in respondents' best interest to only partially respond to Commerce's inquiry. In every situation where this type of analysis would occur, the final dumping margin established by Commerce would thus be understated. By allowing Commerce to reject a submission *in toto,* the court encourages full disclosure by the respondent, because only full disclosure will lead to a dumping margin lower than that established by employing BIA.

In this case, the court finds no error in Commerce's use of the petitioners' information. The court notes that "Commerce has broad discretion in determining what constitutes the BIA in a given situation." *Krupp Stahl A.G., v. United States,* 17 CIT ____, ____, 822 F. Supp. 789, 792 (1993); *see also Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191 (Fed. Cir. 1993) ("[B]ecause Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, [Commerce's] construction of the statute must be accorded considerable deference."). Presently, once Commerce decided that it should resort to BIA for its margin determination, only one source for BIA was available; because Persico was the only respondent in this investigation, Commerce had no source of information other

than the petition. Additionally, unlike cases involving administrative review, there was no prior data regarding Persico which Commerce could use as BIA. Thus, Commerce's only choice was to rely upon the petition information. Finally, the court notes that 19 U.S.C. § 1677e(b) specifically states that Commerce may rely upon petition information as BIA in a final determination. Commerce's choice for BIA in this case is thus in accordance with the law.

Throughout its brief, Persico continually mentions that Commerce found it to be a cooperative respondent. Persico argues that Commerce should account for Persico's cooperation before using BIA; specifically, Persico argues that Commerce should not use BIA against cooperative respondents. This argument neglects the fact that even cooperative respondents can submit deficient or unverifiable information, which would justify using BIA. Neither sections 1677e(b) nor (c) distinguish between cooperative and uncooperative respondents. Those sections simply mention the situations in which Commerce is justified in using BIA. A plain reading of the statute demonstrates that BIA can be used against a cooperative respondent, for they are not exempted from the application of 19 U.S.C. § 1677e.

Moreover, Commerce actually did account for Persico's cooperation. Finding Persico to be a cooperative respondent, Commerce averaged all of the different margins in the petition, and used this average in its final determination. Significantly, Commerce refused to impose the highest margin in the petition, which is its chosen methodology when dealing with uncooperative respondents.[6] In sum, the court finds Commerce's chosen methodology is in accordance with law, and rejects what is essentially Persico's attempt to exact greater leniency from Commerce than what has already been bestowed. Persico's argument is therefore rejected.

CONCLUSION

Commerce's use of BIA in its investigation is supported by substantial evidence in the record, and is in accordance with law. Its choice of using petition information as BIA is also in accordance with law. For the foregoing reasons, Commerce's decision is affirmed in all respects, and plaintiff's motion is denied. Judgment will be entered accordingly.

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[6] Commerce seems to favor reserving the highest possible margin BIA for uncooperative respondents. *See Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1190–91 (Commerce's treatment of uncooperative respondents "results in the selection of the most adverse margin possible as the best information available.").

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/38 4/11/94 Aquilino, J.	International Business Machines Corporation	93–04–00225	8471.93.40 3.7%	8473.30.40 Duty free	Agreed statement of facts	Chicago Chassis or covers for data processing storage units
C94/39 4/12/94 Aquilino, J.	E.T. Horn Company	92–11–00730	2825.9060 3.7%	2519.9010 0.4 cents	Agreed statement of facts	Los Angeles Magnesium oxide, USP
C94/40 4/15/94 Aquilino, J.	Erika Inc. Medical Products Division of National Medical Care, Inc.	91–01–00002	709.17, 9018.90.70203 (depending upon the date of entry)	870.67 or 9817.00.96 (depending upon the date of entry) exempt from the assessment of the merchandise processing ad valorem fee	Sec. 24.23 of the C.R. Sec. 58C(8)(B) Title 19 U.S.C. (Sec. 9501 of P.L. 100–203)	Newark, New York Dialyzers for use in hemodialysis manufactured in and exported from Ireland in 1986, 1989 and 1990
C94/41 4/15/94 Aquilino, J.	Erika Inc. Medical Products Division of National Medical Care, Inc.	91–01–00067	709.17, 9018.90.70203 (depending upon the date of entry)	870.67 or 9817.00.96 (depending upon the date of entry) exempt from the assessment of the merchandise processing ad valorem fee	Sec. 24.23 of the C.R. Sec. 58C(8)(B) Title 19 U.S.C. (Sec. 9501 of P.L. 100–203)	Newark, New York Dialyzers for use in hemodialysis manufactured in and exported from Ireland in 1986, 1989 and 1990
C94/42 4/15/94 Aquilino, J.	Erika Inc. Medical Products Division of National Medical Care, Inc.	91–08–00615	9018.90.70203 Not stated	9817.00.96 (exempt from the assessment of the merchandise processing ad valorem fee)	Sec. 24.23 of the C.R. Sec. 58C(8)(B) Title 19 U.S.C. (Sec. 9501 of P.L. 100–203)	Newark, New York Dialyzers for use in hemodialysis manufactured in and exported from Ireland in 1990

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V94/13 4/12/94 Aquilino, J.	The Body Shop, Inc.	93-07-00424	Transaction value British pounds sterling converted into U.S. dollars	Transaction value in dollars	19 U.S.C. 1401a(b)	New York Sundry articles

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